

Confidentiality in Mediation: An Application of the Right to Privacy

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- I. INTRODUCTION
- II. MEDIATION IN THE HISTORICAL CONTEXT OF PRIVACY LAW
 - A. What is Public and What is Private?
 - B. Defining Privacy
 - C. Application of Constitutional Protections of Privacy in Mediation
 - 1. Fourth Amendment
 - 2. Fifth Amendment
 - 3. Fourteenth Amendment
 - 4. First Amendment
 - D. Tort Law Protection of Privacy
- III. WHAT IS CONFIDENTIALITY?
 - A. Defining Confidentiality
 - 1. Wigmore's Exclusions
 - 2. Confidentiality in the US Census
 - 3. The Uniform Mediation Act (UMA)
 - 4. Mediators' Responsibilities To Define Exceptions to Confidentiality
 - B. An Overview of Statutes and Rules on Confidentiality in Mediation in the Fifty States and the District of Columbia
 - 1. Mediation Statutes are categorized under: Civil Procedure, the Judiciary, Evidence and Independently
 - 2. Differences Among Statutes and Rules on Confidentiality
 - 3. Statutes and Rules Are the Reference Points for Mediation
- IV. LIMITATIONS OF CONFIDENTIALITY IN MEDIATION
 - A. Legal Parameters Limiting Confidentiality Privilege
 - 1. Rules of Evidence
 - 2. USA PATRIOT Act
 - B. Mediators' Duty to Explain Confidentiality Prior to Mediation
- V. CONCLUSION

I. INTRODUCTION

Confidentiality is presented as an essential element when promoting mediation to the public.¹ While some ADR practitioners assume confidentiality to be of primary importance to parties choosing mediation,² others question assumptions about the necessity of,³ or the advisability of,⁴

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¹ Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 240 (2002) [hereinafter “*Predictable Mediation Confidentiality*”] (“The importance of confidentiality is axiomatic in mediation. Or, perhaps more accurately, the *perception* of confidentiality is of central importance.”). See also Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157 (1994) (“An increasingly important aspect of alternative dispute resolution is the privilege which attaches to both parties in an alternative dispute resolution proceeding and the individual(s) presiding over the proceeding.”); Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 10 (“A principal purpose of the mediation privilege is to provide mediation parties protection against th[e] downside risks of a failed mediation. Participation will diminish if perceptions of confidentiality are not matched by reality. Another critical purpose of the privilege is to maintain the public’s perception that individual mediators and the mediation process are neutral and unbiased.”); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 82 (2001), [hereinafter “*The Quest for Uniformity*”] (“[I]n many mediations, confidentiality does far more than merely enhance the candid nature of the discussion; between some adversaries, [it] may be akin to a precondition for any discussion.”); Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986) (“*Privacy is an incentive for many to choose mediation . . . the option presented by the mediator to settle disputes quietly and informally is often a primary motivator for parties choosing this process.*”).

² Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17, 29 (1988) (“The parties have two important interests in preserving confidentiality: to facilitate disclosure by all the parties in order to find the best resolution, and to avoid the sense of betrayal and unfairness that would follow the disclosure of information that a party thought was given in confidence.”).

³ Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 2 (1986) (“[T]he current campaign to obtain a blanket mediation privilege rests

maintaining confidentiality. The rationale most often given for protection of confidentiality is that it encourages consensual dispute resolution.⁵ Yet confusion persists about the reality of promising confidentiality. There is no uniformity in confidentiality protections between state and federal laws, among the states, or even among localities within states.⁶ In addition, many

on faulty logic, inadequate data, and short-sighted professional self-interest. Neither the necessity for such a privilege nor the social utility of a general mediation privilege have been demonstrated.”); see also Scott H. Hughes, *A Closer Look The case for a mediation confidentiality privilege still has not been made*, DISP. RESOL. MAG., Winter 1998, at 14 (“[I]t should be noted that there is almost no empirical support for mediation privileges. For example, no data exists to show a difference in growth rates or overall use of mediation services between jurisdictions with privileges and those without such protections, or from within any jurisdiction before and after the creation of a privilege.”).

⁴ Thomas S. Leatherbury & Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 SMU L. REV. 2221, 2222 (1993) (“Problems arise when legitimate reasons support both openness and confidentiality. One such problem involves mediation of public policy disputes, in which the policy of open government clashes with the policy of facilitating mediation through confidentiality.”); see also Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 27 (“[T]here are nevertheless two strong reasons why the details of a mediation session should *not* be kept completely confidential. First, if the process is allowed to go on without any sort of review, then it lacks public accountability Secondly, if there are unrepresented but concerned parties who have a right to know or a duty to be warned about something introduced in mediation, then there is a pull towards breaking confidentiality.”); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 593 (2001) (“Unlike court-mandated ADR, where parties are ordered to ADR but ultimately retain the right to a judicial trial, parties subject to private mandatory ADR by contrast are effectively precluded from judicial recourse.”); Michael A. Perino, *Drafting Mediation Privileges: Lessons From the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 12 (1995) (“Like all privileges, a mediation privilege is an exception to the principle that the public is entitled to ‘every man’s evidence.’”).

⁵ Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 958 (July 1988) (describing the rationale behind drafting Federal Rule of Evidence 408: “This rationale recognized that it was in the public interest, and in the interest of individual litigants, to encourage consensual resolution of disputes.”).

⁶ See Deason, *The Quest for Uniformity*, *supra* note 1, at 100 (“[B]ecause states currently use so many different legal frameworks to protect mediation confidentiality, because these statutory frameworks can be ambiguous to categorize, and because federal courts use different analytical approaches to choice of law . . . vertical choice of law for confidentiality is an amazingly complex, multi-factorial analysis.”).

statutes do not refer to the court's authority to override confidentiality.⁷ Yet mediators commonly make broad statements claiming that everything in mediation is confidential. Oversimplification of the offer of confidentiality fails to support self-determination of the parties in neglecting to give legal information that is necessary to make informed choices. Informed consent⁸ in mediation, as in medicine,⁹ is the basis for self-determination.¹⁰ Informed consent as it applies to both confidentiality and self-determination is an indication of how profoundly these two basic elements¹¹ of mediation intersect. This article examines the roots of confidentiality in privacy law and proposes that mediators comply with standards of self-determination by informing parties about the legal rights and limitations represented in the choice to maintain or waive confidentiality in mediation.

⁷ Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 33 (2003) ("Few . . . statutes, however, acknowledge the authority of a court to override the confidentiality privilege to enforce participation orders, address claims of participant misconduct, or to prevent abuse of process or professional ethics violations.").

⁸ Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 781 (1999) ("Informed consent is the foundational moral and ethical principle that promotes respect for individual self-determination and honors human dignity.").

⁹ Joshua B. Murphy, *Benefits and Challenges of Informed Consent*, 83 MAYO CLIN. PROC. 272, 272 (2008) ("[T]he dialogue with the patient should not be confused with a mere listing of a string of potential complications. The physician should strive not just to say all the right words, but to impart information and engender in the patient an understanding of the risks to which the patient might be exposed.").

¹⁰ Scott H. Hughes, *The Uniform Mediation Act: To The Spoiled Go The Privileges*, 85 MARQ. L. REV. 9, 72 (2001) ("Self-determination, which arises from voluntary and informed decision-making, represents the cornerstone of all mediation. To this proposition, there is no debate.").

¹¹ Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving A Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 795 (2005) ("[I]t is . . . incumbent upon the mediator to explain the basic components of mediation. Certain elements would ideally be present: (1) self-determination of the parties; (2) the good faith intention of the parties to negotiate and disclose all relevant information; (3) impartiality and neutrality of the mediator in relation to the parties and the outcome; (4) a balance of power and fairness. In addition to these four, a fifth must be discussed fully, weighed carefully, and mutually decided upon by the parties prior to signing the agreement to mediate—(5) confidentiality.").

The impetus for adopting Alternative Dispute Resolution (ADR) processes was initiated by the courts.¹² Claiming that society was becoming excessively litigious,¹³ proponents of ADR have waged a public relations campaign since the 1976 Pound Conference¹⁴ to convince litigants to remove disputes from the courtroom.¹⁵ While advocates of informal justice¹⁶ would have us believe that ADR empowers communities,¹⁷ implementation of informal dispute resolution processes¹⁸ through "community justice centers"¹⁹ may actually increase the potential for state control.²⁰ Coherence

¹² Susan Oberman, *Style vs. Model: Why Quibble?* 9 PEPP. DISP. RESOL. L.J. 1, 9-10 (2008) ("Following the Pound Conference, the court program to implement informalization introduced mediation into neighborhoods and families. Thus, the 'mandate' to provide informal justice was an extension of the courts, endorsed by legal professionals who recognized the social consequences of denying access to justice.").

¹³ Susan S. Silbey, *The Emperor's New Clothes: Mediation Mythology and Markets*, 2002 J. DISP. RESOL. 171, 175 ("For those who thought modern society's reliance of law was excessive, primarily Chief Justice Warren Burger, insurance companies, the corporate bar and other members of the legal establishment, mediation represented a way of clearing court dockets for more important business litigation.").

¹⁴ Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. DISP. RESOL. 545, 546 (2002) ("The Pound Conference was organized around the premise that society was dissatisfied with the state of the justice system, and the task of the Conference was to explore the sources of dissatisfaction as well as the possible remedies. Mediation was offered as one promising remedy for the particular dissatisfaction that arose from the cost, delay, and inaccessibility of adjudication attributed to a burgeoning judicial caseload.").

¹⁵ Richard C. Reuben, *Public Justice: Toward A State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 580 (1997) ("[M]ore and more cases are delegated—legislatively, judicially, and contractually—out of public courts and into private hearings, thanks to the rise of alternative dispute resolution (ADR).").

¹⁶ CHRISTINE B. HARRINGTON, *SHADOW JUSTICE THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT*, 2 (1985) ("The ideology of informalism is structured by its relationship to delegalization movements and order maintenance concerns Ostensibly replacing formalism as an ideology, informalism retains a legalistic core that ties it to conventional practice.").

¹⁷ Richard L. Abel, *Introduction to THE POLITICS OF INFORMAL JUSTICE, VOLUME I: THE AMERICAN EXPERIENCE* at 9 (Richard L. Abel, Ed., 1982), ("Informal justice claims to be a 'community' institution, but the residential community it serves is usually just the figment of some reformer's imagination.").

¹⁸ See HARRINGTON, *supra* note 16, at 12 ("Informal procedures are idealized as nonadversarial, rehabilitative, and preventative methods for resolving conflict.").

¹⁹ RICHARD HOFRICHTER, *NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY THE EXPANSION OF THE INFORMAL STATE*, xiv (1987) ("NDR [Neighborhood Dispute Resolution] falsely affirms the neighborhood as the basis of justice in the community

in communities is undermined when disputes are framed as individual rather than social,²¹ and when the demand for rights previously resolved by established legal norms²² are “transformed” into needs²³ channeled into informal²⁴ problem solving.²⁵ There is evidence that minority groups are disadvantaged in informal processes²⁶ that depart from formal legal

... it presents an idea of community and collective self-help that is contrived, uses community culture against itself as a form of regulation and, by its presence, distracts attention from broader community issues.”).

²⁰ George Pavlich, *The Power of Community Mediation: Government and Formation of Self-Identity*, 30 LAW & SOC’Y REV. 707, 711 (1996) (“Against such elevated visions, early critics of the alternative dispute resolution proposals have argued that far from restricting state control over individual lives, of empowering and liberating individual disputants, community mediation programs actually expand and intensify state control.”).

²¹ See ABEL, *supra* note 17, at 9 (“[B]y individualizing conflict and facilitating exit from relationships, informal institutions undermine community rather than create or preserve it.”).

²² Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee, & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1374 (“[M]odern rules of procedure and evidence contain numerous provisions that are intended to reduce prejudice in the trial system by defining the scope of the action, formalizing the presentation of evidence, and reducing strategic options for litigants and counsel. ADR, to date, has very few such safeguards.”).

²³ Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW & SOC’Y REV. 397, 411–12 (1997) (“[W]hile rights construct the relation between self and community, their reformulation into needs disintegrates that community, as actions that were obligated within a normative frame are reframed as actions that please or appease an individual.”).

²⁴ See Weston, *supra* note 4, at 594 (“It is precisely the informality and private environment of ADR—perceived benefits of the system—that also raise concerns about the fairness of the process . . . ADR processes are cloaked with confidentiality privileges, conducted by private third-party neutrals who are unaccountable to the public or judicial system and not bound to follow or apply the law.”).

²⁵ Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (“[T]he assumption that people prefer treating disputes as problems to be solved rather than as conflicts to be resolved according to publicly adopted norms, is central to mediation ideology.”).

²⁶ Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 792–93 (1996) (“[E]vidence of disparity in the treatment of minorities and women was limited mostly to minority male and female claimants in mediated cases. Minority male and female claimants did worse in cases mediated by at least one Anglo mediator; minority female claimants did worse in cases mediated by two women.”).

principles.²⁷ Informal processes may deprive parties of the right to due process²⁸ and often presume an equality among participants that may not exist.²⁹ Naming these processes “alternative” dispute resolution calls into question the authority of the court to monitor court-referred mediation,³⁰ and leaves unanswered innumerable questions about regulation of private mediation.³¹ Mediation is promoted as a process that gives parties the authority to make decisions based on their own values and sense of fairness.³² Although the mediator’s role is to uphold neutrality and fairness, the authority of the court to monitor fairness is in doubt.³³ Mediation

²⁷ See Hensler, *supra* note 25, at 85 (“[T]he notion that Americans who believe they have a legal claim prefer to resolve such claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts.”).

²⁸ SHEILA HEIM ET AL., CAL. NAT’L ORG. FOR WOMEN, FAMILY COURT REPORT 2002, AT 3 (2002) (“The system leaves decisions which should be made on facts in a courtroom to extra judicial public and private personnel. The system precludes the parties, particularly the mother, from her rights to due process, including a trial.”).

²⁹ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (“By viewing the lawsuit as a quarrel between two neighbors, the dispute-resolution story that underlies ADR implicitly asks us to assume a rough equality between the contending parties In truth, however, settlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally.”).

³⁰ See Weston, *supra* note 7, at 35 (“The strong statutory protection for mediation confidentiality threatens a court’s traditional power to monitor the litigation process and to sanction parties and attorneys when the offending conduct occurs in a court-connected mediation context.”).

³¹ Peter N. Thompson, *Enforcing Rights Generated In Court-Connected Mediation—Tension Between The Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 513 (2004) (“The mediation community has been effective in convincing the courts and regulators to keep their hands off the emerging ADR processes in order to maximize individual choice, creativity, flexibility, and of course, finality.”).

³² Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 56 (1996) (“Instead of law, free-standing normative standards govern in mediation, and parties actually affected by a dispute decide what factors should influence the efforts to resolve that dispute. Thus, the moral reference point in mediation is the self, and individualized notions of fairness, justice, morality, ethics and culture may trump the values associated with any objective framework provided by law.”).

³³ See Weston, *supra* note 7, at 53–54 (“Judicial authority to sanction parties for conduct or participation violations in a pretrial settlement conference or court-connected arbitration is rarely challenged on confidentiality grounds. By contrast, courts are divided as to whether mediation statutory confidentiality privileges prevent judicial consideration of similar claims in a mediation setting.”).

advocates attempt to assuage fears of ever increasing pressure through the courts to direct parties into mediation³⁴ while continuing to contend that the process is voluntary and belongs to the parties, despite evidence to the contrary.³⁵

Forty-nine states (the exception is New York where local jurisdictions provide the rules for mediation) and the District of Columbia have enacted legislation and/or adopted court rules that protect confidentiality in court-referred mediation cases.³⁶ Some statutes offer legal protections of

³⁴ Jennifer Phillips, *North Carolina's Child Custody and Visitation Mediation Program*, RESOLUTIONS (Supreme Court of Va., Richmond, Va.), Apr. 2010, at 4 ("The word 'mandated' causes many people in the mediation community discomfort and a common misperception is that people are forced to mediate. However, in the NC 'mandated' program, the parties involved are only mandated to appear. Participation and certainly an agreement are entirely voluntary.").

³⁵ Timothy Hedeem, *Coercion and Self-Determination In Court-Connected Mediation: All Mediations Are Voluntary But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273, 280, (2005) ("Evidence drawn from recent caselaw and legal education events suggests that many mediators engage in coercion to keep disputants at the table. Such coercion may be exercised through acts of commission or omission.").

³⁶ ALA. CODE § 6-6-20 (2011); ALASKA R. CIV. P. 100; ARIZ. REV. STAT. § 12-2238 (LexisNexis 1956); ARK. CODE ANN. § 16-7-201-207 (1987); CALI. EVID. CODE §§ 1115-1128 (West 2012); COLO. CODE REGS. §§ 13-22-302-308; CONN. GEN. STAT. § 52-235c; *id.* at § 52-235d (2011); DEL. CT. CH. R. 174; D.C. CODE §§ 16-4201-4213 (2001); FLA. STAT. ANN. § 44.102-108 (West 2012); *id.* at § 44-1011; *id.* at 44-201; *id.* at § 44-401-406; GA. CODE ANN. § 15-23-1-12 (2010); HAW. R. EVID. §§ 0626-0001-0620-0408; IDAHO CODE ANN. §§ 9-801-814 (West 2011); 710 ILL. COMP. STAT. 35/1-8 (2004); IND. CODE §§ 4-21.5-3.5-1-4-21.5-3.5-27 (1996); IOWA CODE § 679C.1-5 (2011); KAN. STAT. ANN. §§ 5-501-5-516, (West 2011); KY. REV. STAT. ANN. § 454.011 (West 2011); LA REV. STAT. ANN. §§ 4101-4112 (West 2011); ME. REV. STAT. tit. 4, § 18-B (2011), ME. R. CIV. P. 16B; MD. R. CIV. P. §§ 17-102-109, MD. CODE ANN. CTS. & JUD. PROC. §§ 3-2A-06C (West 2011); MASS. GEN. LAW ANN. ch. 233 § 23C (2011), MASS. S. JUD. R. 1:18; MICH. CT. R. §§ 2.41-2.411; MINN. STAT. ANN. §§ 572.31-572.40 (West 2011); Mississippi Court Annexed Mediation Rules for Civil Litigation, *available at* <http://courtadr.org/library/view.php?ID=3640> (last visited Mar. 19, 2012); MISS. S.C.T. R. 17.01-17.07; MONT. CODE ANN. § 25-21-7 (West 2011); NEB. REV. STAT. ANN. §§ 25-2901-2911 (West 2011); *id.* at §§ 25-2930-2943; NEV. REV. STAT. § 48.109 (1991); N.H. SUPER. CT. R. 170; N.J. STAT. ANN. §§ 2A:23A-112(2012), N.J. CT. R. 1:40-1-12; N.M. STAT. ANN. § 44-7B-1-6 (West 2011); N.C. GEN. STAT. § 7A-38.1 (West 2011); *id.* at § 150B-23; 1 N.D. S.C.T. R. 8.8; OHIO REV. CODE § 2710.01-10 (West 2011); OK. STAT. § 1821-25 (West 2011); *id.* at § 1831-36; OR. REV. STAT. §§ 36.200-238 (West 2012); 42 PENN. CONS. STAT. ANN. § 5949 (West 2011); R.I. GEN. LAWS ANN. § 9-19-44 (West 2011); S.C. CT. ADR R. 6-8; S.D. CODIFIED LAWS §§ 19-13A-1-15; *id.* at § 19-13-32 (West 2011); TENN. R. S.C.T. 31; TEX. CIV. PRAC. & REM. CODE ANN. § 154 (West 2001); UTAH JUD. CODE §§ 78-31c-101-114; VT. STAT. ANN. §§ 5711-5723 (West 2010); VA.

CONFIDENTIALITY IN MEDIATION

confidentiality even more far-reaching than those given for settlement conferences.³⁷ As legislation and court regulation of mediation became widespread, mediators were expected to comply with legal criteria regarding confidentiality. Standards of ethics and certification requirements for mediators have been implemented in many states. When offering mediation, court-certified mediators are required to inform parties of the nature of the mediation process, to explain the choice to maintain or waive confidentiality, to assess the capacity of each party to exercise self-determination and good faith, and to ensure fairness. These mediator functions fall within the doctrine of state action—a doctrine that differentiates between public actions and those of private individuals—which holds those who function as extensions of courts or legislatures to the legal standards required of public servants.³⁸ Mediation functions within the description of state action³⁹ regardless of the claim that parties enter voluntarily.⁴⁰ ADR processes are within the realm of state action not only in the attempt to resolve disputes, but in court enforcement of agreements made in ADR.⁴¹ Thus, the decision to maintain or waive confidentiality raises questions within the context of a constitutional debate about what is public and what is private that has been argued for

CODE ANN. §§ 8.01-576.4–12 (West 2011); *id.* at §8.01-581.21–26; WASH. REV. CODE 7.07 (2006); W.V. TRIAL CT. R. § 25; WIS. STAT. § 904.085 (West 2011); WY. STAT. §§ 1-43-101–104 (West 2011).

³⁷ See Brazil, *supra* note 5, at 956 (“[S]tate legislation is significant because it erects a protective shield around mediations that appears to be more difficult to penetrate than the shields that Federal Rules of Evidence 408 and 403 erect around settlement communications.”).

³⁸ Paul Brest, *State Action and Liberal Theory*, 130 U. PA. L. REV. 1296, 1301 (1982) (“The doctrine of state action is an attempt to maintain a public/private distinction by attributing some conduct to the state and some to private actors.”).

³⁹ See Reuben, *supra* note 15, at 589 (“[T]he United States Supreme Court’s ‘state action’ doctrine can often compel an understanding of ADR providers as ‘state actors’ when their services are court-ordered, legislatively mandated, or contractually compelled.”).

⁴⁰ See *id.* at 617 (“[V]oluntariness has no role in the determination of state action. Instead, the state action analysis quite properly asks a very different question: To what degree does private conduct either become so entangled with the action of the state, or assume a function traditionally performed exclusively by the state, that such conduct should be deemed attributable to the state for constitutional purposes?”).

⁴¹ See *id.* at 621 (“It is this element of state enforcement that distinguishes matters of constitutional moment from those of purely private concern. The binding resolution of disputes is, of course, a traditionally exclusive public function.”).

centuries.⁴² The debate poses a conflict between natural rights:⁴³ a belief that certain rights are beyond any government's control⁴⁴ and are held by all persons, and positivism; the claim that citizens must relinquish natural rights to governments who then grant specific individual rights through legal processes.⁴⁵

Explaining confidentiality is therefore a prime example of how mediators function as representatives of the law and the court. In the explanation of confidentiality, the mediator 1) gives legal information; 2) has a responsibility to ensure parties understand the information; and 3) must determine that parties are capable of making a decision in their own best interest. Some states that offer confidentiality inform parties of the right to waive it,⁴⁶ while others do not.⁴⁷ Those states with no right to waive

⁴² See Brest, *supra* note 38, at 1297 ("The tension between positivism and natural law has been a perennial theme in American constitutional jurisprudence The debate has centered on the extent to which the Justices may protect interests or rights beyond those mentioned in the document.").

⁴³ Perhaps the clearest contemporary statement of the natural rights position can be found in the Universal Declaration of Human Rights, which can be found at U.N., *History*, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, <http://www.un.org/en/documents/udhr/history.shtml> (last visited Mar. 18, 2012).

⁴⁴ See Brest, *supra* note 38, at 1300 ("[T]he natural rights doctrine posits a sphere of autonomous private conduct immune from state regulation; the state action doctrine protects that sphere from certain kinds of governmental interference.").

⁴⁵ See *id.* at 1296–97 ("From its inception liberal theory has had two traditions, originating in the writings of Locke and Hobbes respectively. Under the Lockean or 'natural rights' version, citizens retain certain inalienable rights, held in the pregovernmental state of nature, that the state may not abridge. Under the Hobbesian or 'positivist' version, citizens entering into civil society relinquish all natural rights and possess only those rights granted by legislatures and other lawmaking institutions The tension between positivism and natural law has been a perennial theme in American constitutional jurisprudence.").

⁴⁶ AL. ST. MEDIATION R. 11; ARIZ. REV. STAT. § 12-2238 (LexisNexis 1956); CAL. EVID. CODE §§ 1119–1124 (West 2012); *id.* at §§ 1126–1128; 13 COLO. CODE REGS. § 22-307 (West 2012); CONN. GEN. STAT. §§ 52-235d (b)–(d) (2011); DEL. CT. CH. R. 174; D.C. CODE § 16-4203 (2001); FLA. STAT. ANN. § 44-405 (West 2012); IDAHO CODE ANN. § 9-804 (West 2011); 710 ILL. COMP. STAT. 35/4 (2004); IND. CODE § 4-21.5-3.5-18 (1996); KAN. STAT. ANN. § 5-512(a) (West 2011); *id.* at § 5-512(b)(1)–(5); LA. REV. STAT. ANN. § 4112 (West 2011); ME. R. CIV. P. 16B(k); MICH. CT. R. § 2.411(5); MINN. ST. GEN. PRAC. R. § 114.08; NEB. REV. STAT. § 25-2934 (West 2011); NEV. ADR R. 11; N.M. STAT. ANN. § 44-7B-5 (West 2011); N.D. R.Ct. 8.8(d)(1)–(3); OHIO REV. CODE § 2710.03 (West 2011); *id.* at § 2710.07; OREG. REV. STAT. §§ 36.220–226 (West 2012); S. C. ADR R. 8; S.D. CODIFIED LAWS § 19-13A-5 (West 2011); *id.* at § 19-13A-8; § 19-13A-32 TEX. CIV. PRAC. AND REM. CODE ANN. § 154.053(b)–(c) (West 2001); UTAH JUD.

CONFIDENTIALITY IN MEDIATION

confidentiality, in effect, mandate parties to keep what is said from being disclosed in future litigation⁴⁸ at the same time parties are often discouraged from going to court.⁴⁹ In granting mediators exclusion from giving testimony, many statutes borrow from the privilege granted to other professionals: attorneys, clergy, and health care providers,⁵⁰ allowing them to maintain confidentiality regarding clients, penitents, and patients. When granted to mediators,⁵¹ the privilege both restricts the mediator from disclosing information and allows the mediator to refuse to give testimony.⁵² While other professionals protected by a confidentiality privilege are required to maintain confidentiality, mediation also requires that adversarial parties agree to maintain one another's confidences. Thus, unlike the privilege granted to attorneys, clergy, and physicians, in mediation

CODE ANN. § 78-31c-105 (LexisNexis 2008); *id.* at §78-31c-108; VT. STAT. ANN. § 5716 (West 2010); VA. CODE ANN. § 8.01-581.22 (West 2011); *id.* at §8.01-581.24; *id.* at § 2.2-4119B; WASH. REV. CODE § 7.07.040 (2006); *id.* at § 7.07.050; *id.* at § 5.60.070; W. VA. TRIAL CT. R. § 25.12; WY. STAT. § 1-43-103 (West 2011).

⁴⁷ States that do not explain the right to waive confidentiality are: Alaska, Arkansas, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Wisconsin.

⁴⁸ Erin L. Kuester, *Confidentiality In Mediation: A Trail Of Broken Promises*, 16 HAMLINE J. PUB. L. & POL'Y 573, 574 (1995) ("The unsettled state of the law reflects a tug-of-war between protecting mediation as a viable alternative to litigation and preserving fairness in litigation by requiring decisions based upon all of the available evidence.").

⁴⁹ Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 195 (2003) ("To encourage people to consider alternatives to litigation, in federal and state courts nationwide, judges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change.").

⁵⁰ Tyler Baker, *Roe and Paris: Does Privacy Have a Principle?* 26 STAN. L. REV. 1161, 1179 (1974) ("Priests, physicians, and other professionals are often privy to confidential information about individuals that those individuals would not want widely disseminated, creating a strong selective disclosure interest.").

⁵¹ See Thompson, *supra* note 31, at 519 ("Th[e] unique role of the mediator as trusted confidant is largely responsible for the enhanced concern for confidentiality or privilege that has been readily accepted by legislators and rule makers.").

⁵² See Hughes, *supra* note 10, at 24-25 ("Confidentiality represents, first, a positive duty not to disclose secret communications and, second, the freedom to refuse to answer questions in court.").

confidentiality places constraints on the parties,⁵³ as well as on the mediator who serves the parties.

Although mediation is advertised as protecting the privacy of the parties,⁵⁴ the exploration of the underpinnings of confidentiality in the right to privacy is sorely neglected. If most parties prefer keeping everything said in mediation private,⁵⁵ then mediation offers a rare opportunity to exercise the right to privacy. Parties may assert their right to privacy in mediation in relation to both the government (as embodied in the court), and, within limits,⁵⁶ other citizens. However, as lawmakers have created statutes and rules to protect privacy⁵⁷ in ADR processes, there has been ongoing

⁵³ See Deason, *The Quest for Uniformity*, *supra* note 1, at 82 (“Because mediation involves communication with an adversary, the legal structures that promote confidentiality must do more than function as a restraint on outside parties who seek disclosure; they must also provide a substitute for trust between those who are communicating.”).

⁵⁴ Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access in the Courts*, 105 HARV. L. REV. 428, 464 (1991) (“One of the substantive rights that only confidentiality can protect is the right to privacy. In the discovery context, the privacy interest is ‘the individual interest in avoiding disclosure of personal matters.’”). See also Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of Mediation Privilege in Minnesota*, 18 HAMLINE J. OF PUB. LAW & POL’Y 329, 355 (1997) (“One of the promised advantages of mediation as a means of dispute resolution is that it provides the parties with a private, informal, user-friendly approach to resolving disputes, free from negative, technical, adversarial procedures.”).

⁵⁵ Richard A. Posner, *Privacy, Secrecy and Reputation*, 28 BUFF. L. REV. 1, 4–5 (1979) (“The vocal modern demand for privacy has little to do with either a craving for solitude that arose in the past from a combination of the lack of physical privacy in the home and the pacification of the surrounding countryside ... What people want more of today when they decry lack of privacy is mainly something quite different: they want concealment of information about themselves that others might use to their disadvantage.”).

⁵⁶ See Kirtley, *supra* note 1, at 11 (“Agreements between individuals are not permitted to restrict the court’s access to testimony in its pursuit of justice. As a result, mediation participants are ill advised to rely on contract theory as a means of preserving mediation confidentiality. Moreover, mediation confidentiality agreements, even if enforceable as against those signing, are likely not to restrict third-party access to mediation information.”).

⁵⁷ See Reuben, *supra* note 15, at 584–85 (“[C]ritics charge that ADR’s processes are secret, not ‘private,’ and deliver a skewed brand of justice that flouts structural safeguards, commercializes dispute resolution, exploits inequality of bargaining power, and ultimately fails to provide adequate remedies for weaker parties, such as women, minorities, and those with less economic power.”).

controversy about the abandonment of procedural justice in ADR.⁵⁸ Thus, while recognition of confidentiality as an application of the right to privacy would celebrate the choice to maintain it, parties must be made aware of the limitations of confidentiality within the legal framework, such as rules of evidence.⁵⁹ While acknowledging the enormous complexity of the right to privacy in U.S. law,⁶⁰ this article will locate the origins of confidentiality in mediation in several constitutional amendments, tort law,⁶¹ and Supreme Court decisions, which together make up the complex concept of the right to privacy. In addition, we recognize that beyond the cloistered debates of legal scholars, attorneys, and judges, are deeply held beliefs of U.S. residents⁶² that our system of government protects us as individuals.⁶³ Even without

⁵⁸ See *id.* at 606 ("The very suggestion, however, that a forum that *guarantees* such procedural safeguards as the right to the benefit of public law, the right to a neutral tribunal, and the rights to present evidence and receive appellate review is the functional equivalent of a procedure that *permits*, but does not assure, any such safeguards seems astonishing on its face.").

⁵⁹ Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 106 (1999) ("When the question is not the validity or invalidity of the underlying claim, but rather a material issue of an act which occurred during the negotiations, Rule 408 does not prohibit the admission of evidence. ... Wrongful acts are not protected simply because they occurred during settlement discussion. The rule excluding settlement offers and discussions was not intended to be a shield for the commission of independent wrongs.").

⁶⁰ Judith Jarvis Thompson, *The Right To Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975) ("Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.").

⁶¹ Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 n.3 (1977) ("In just what sense the tort law right of privacy corresponds to the constitutional right is a question almost entirely neglected in discussions (and decisions) on privacy. Reviewing the federal constitutional usage up to and including *Griswold*, Prosser remarked upon an aspect of this ambiguity: 'The Court never has made any attempt to define this right [to privacy guaranteed by the Constitution], or to indicate its limitation, if any; and nothing in the decisions has referred to tort liability. They suggested nonetheless that the Constitutional right, thus declared to exist, must have some application to tort liability.'").

⁶² STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* 3, 3 (1974) ("The law is real, but it is also a figment of our imaginations. Like all fundamental social institutions it casts a shadow of popular belief that may ultimately be more significant, albeit more difficult to comprehend, than the authorities, rules, and penalties that we ordinarily associate with law.").

⁶³ Edward J. Bloustein, *Privacy As An Aspect of Human Dignity: An Answer To Dean Prosser*, 39 N.Y.U. L. REV. 962, 973 (1964) ("The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types

knowledge of the origin of these beliefs,⁶⁴ Americans from all walks of life consider the right to be let alone—the freedom to live our lives as we choose—basic to our sense of national identity.⁶⁵

Identifying confidentiality as an application of the right to privacy in the context of constitutional and tort law and federal and state legislation gives significance to the decisions parties are making in mediation. Deciding what is private and what must be disclosed in mediation raises questions about Fourth Amendment protection of property, as it would in litigation.⁶⁶ Applying the Fifth Amendment to mediation, granting parties and mediators immunity from testifying, protects a party's right not to incriminate him or herself.⁶⁷ The Fourteenth Amendment protection of liberty to live one's life and raise one's children as we choose as individuals and families is often the arena in which parties are making decisions in mediation, particularly family mediation.⁶⁸ In addition to the protections found in the Fourth, Fifth, Ninth,⁶⁹

of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts.”).

⁶⁴ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 9 (1983) (“[L]aw is our national religion; lawyers constitute our priesthood; the courtroom is our cathedral, where contemporary passion plays are enacted.”).

⁶⁵ “[R]ightful liberty is unobstructed action, according to our will, within limits drawn around us by the equal rights of others.” Thomas Jefferson, *The Thomas Jefferson Papers Series 1, General Correspondence*, 1651–1827, Thomas Jefferson to Isaac H. Tiffany, April 4, 1819, available at <http://hdl.loc.gov/loc.mss/mtj.mtjbib023463>, image 462 (Last visited Mar. 18, 2012). “I believe each individual is naturally entitled to do as he pleases with himself and the fruits of his labor, so far as it in no wise interferes with any other men's rights.” Abraham Lincoln, Speech at Chicago Illinois, July 10, 1858, *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 493 (Roy P. Basler, ed. 1956); Pub. Utilities Comm'n of Dist. Of Columbia v. Pollack, 343 U.S. 451, 467 (1952). (“The right to be let alone is indeed the beginning of all freedom.”).

⁶⁶ See Miller, *supra* note 54, at 466 (“Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door.”).

⁶⁷ Kimberlee K. Kovach, *Good Faith In Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 611 (1997) (“[I]f the parties refuse to share particular knowledge, they should not be compelled to do so.”).

⁶⁸ See Baker, *supra* note 50, at 1174 (“[T]he Court has held that the right to privacy ‘encompasses and protects personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.’”) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973)).

⁶⁹ Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1419 (1992) (“[T]here is an assumption that the Bill of Rights is neither all-specific nor

and Fourteenth Amendments, is the First Amendment protection of "serenity and reflection"⁷⁰—the right not to be invaded by others' speech within the home and in some public situations.⁷¹ In the context of mediation, therefore, freedom for serenity and reflection would mean that the coercion to mediate that is often applied⁷² is not only unacceptable, it is unconstitutional.

This article locates the roots of confidentiality in mediation, in the right to privacy. While unevenly protected at different periods of history,⁷³ the right to privacy rests on the foundation of hundreds of years of resistance to tyranny. Forged in common law,⁷⁴ legislation,⁷⁵ and Supreme Court

exhaustive, leaving room for interpretation and gap-plugging by the courts. This is precisely what the Ninth Amendment (whether one agrees that it embodies specific rights or not) was designed to remind future generation reading the Constitution.”).

⁷⁰ See *id.* at 1380 (quoting Justice Frankfurter’s opinion in *Kovacs* (“Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society.”)).

⁷¹ See *id.* at 1382 (“Justice Douglas, in a vigorous dissent [in *Public Utilities Commission v. Pollack*, 343 U.S. at 468] . . . argues that: ‘The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.’”).

⁷² See Hedeon, *supra* note 35, at 277 (“Even in States and court systems that have explicit guidelines to maintain the voluntary nature of mediation participation... implicit coercion has been documented in both civil and criminal courts. A study conducted for the Department of Justice found that a number of programs ‘use very threatening letters to compel respondents to appear for mediation with the complainant.’”).

⁷³ See Gormley, *supra* note 69, at 1370 (“[T]he existence or non-existence of Fourth Amendment privacy now appears to be dependent (to some extent) upon the subject-matter of the case.”).

⁷⁴ See *Marks v. Jaffa*, 26 N.Y.S. 908 (N.Y. Sup. Ct. 1893); *Mackensie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (N.Y. Sup. Ct. 1891); *Corliss v. E.W. Walker Co.*, 64 F. 280 (C.C. D. Mass. 1894); *Munden v. Harris*, 134 S.W. 1076 (Mo. Ct. App. 1911); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909); *Edison v. Edison Mfg. Co.*, 73 N.J. Eq. 136 (N.J. 1907); *Moser v. Press Publishing Co.*, 109 N.Y.S. 963 (N.Y. Sup. Ct. 1908); *Jeffries v. New York Evening Journal Publishing Co.*, 124 N.Y.S. 780 (N.Y. Sup. Ct. (1910); *Pavesich v. New England Life Ins., Co.*, 50 S.E. 68 (Ga. 1905); *Henry v. Cherry and Webb*, 73 A. 97 (R.I. 1909); *Peed v. Washington Times Co.*, 55 Wash. L. Rep. 182 (D.C. 1927); *Martin v. New Metropolitan Fiction*, 248 N.Y.S. 359 (N.Y. App. Div. 1931); *Murphy v. Pocatello School Dist.*, 480 P.2d 878 (Idaho 1971); *Moe v. Secretary of Administration*, 417 N.E.2d 387 (Mass. 1981); *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *In Re B*, 394 A.2d 419 (Pa. 1978); *Texas State Employees Union v. Texas Dept. of Mental Health*, 746 S.W.2d 203 (Tex. 1987).

decisions,⁷⁶ the right to privacy provides the basis for offering confidentiality in mediation, as mediation sits squarely within the legal system.⁷⁷ Ongoing confusion about the role of mediation as an option within the law, rather than an alternative to it,⁷⁸ obscures important legal and social values embodied in the right to privacy.⁷⁹ This article seeks to bring recognition to both the value and precariousness of confidentiality as an application of the right to privacy, and also explores some complexities surrounding the decision to maintain it. Section II looks at confidentiality in mediation in the historical context of constitutional and tort law. Section III presents an overview of current state regulations regarding confidentiality in mediation. Section IV addresses the limitations of the protection of confidentiality in the event of litigation. In conclusion, Section V calls upon mediators and courts to recognize confidentiality as an application of the right to privacy and recommends that

⁷⁵ Frederick S. Lane, *American Privacy* 61 (2009) (“[N]early a third of the states have added a privacy provision to their constitutions, and even more recognize a right to privacy in some form or other in their statutes.”).

⁷⁶ See *Boyd v. United States*, 116 U.S. 616, 624–29 (1886); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Nardone v. United States*, 302 U.S. 379 (1937); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Silverman v. United States*, 365 U.S. 505 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967); *Loving v. Virginia*, 388 U.S. 1 (1967); *Berger v. New York*, 388 U.S. 41 (1967); *Camara v. Mun. Court*, 387 U.S. 523 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Rowan v. United States Post Office*, 397 U.S. 728 (1970); *United States v. United States Dist. Court*, 407 U.S. 297 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *Mancusi v. De Forte*, 392 U.S. 364 (1968); *Roe v. Wade*, 410 U.S. 113 (1973); *Oliver v. United States*, 466 U.S. 170, 178 (1984); *Frisby v. Schultz*, 487 U.S. 474 (1988).

⁷⁷ See *Weston*, *supra* note 7, at 79 (“In turning to mediation in order to escape the pitfalls of litigation, the legislature desires to treat mediation as a completely separate and private process. Mediation offers a promising and productive means for parties to achieve understanding and resolution of their differences, but it is not immune from the rule of law. Particularly where mediation is a component of the public political system, the authority and responsibility of the court cannot be completely divested.”).

⁷⁸ See *Oberman*, *supra* note 12, at 48 (“The conception of mediation as an alternative to the legal system, rather than an option within it . . . creates an obstacle to a discourse about mediation that would include the law as a resource for individuals and oppressed groups seeking equality.”).

⁷⁹ See *Reuben*, *supra* note 15, at 639 (“The social contract supporting our constitutional order has been breached, and the democratic process that allowed for the creation and the application of the rule of law subverted, by order of the court.”).

mediation training and courses provide clarity about the relationship of mediation to the law, particularly regarding confidentiality. The ability to explain the legal underpinnings of confidentiality would bring mediators into compliance with the standard of self-determination that requires parties to make informed decisions.

II. MEDIATION IN THE HISTORICAL CONTEXT OF PRIVACY LAW

A. *What is Public and What is Private?*

In order to establish confidentiality in mediation as an application⁸⁰ of the right to privacy,⁸¹ we must revisit the battle to define and protect some areas of life as private. Justice Marshall's frequently cited opinion that there exists "a sphere of private autonomy which government is bound to respect,"⁸² refers to a long struggle in England and other parts of Europe⁸³ to establish rights that a monarch or state could not deny or destroy.⁸⁴ The quintessential statement of American democracy, the Declaration of Independence,⁸⁵ declares that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain

⁸⁰ See Gerety, *supra* note 61, at 234 ("A properly legal concept must be a principle that translates into a rule; and the rule, in turn, must translate into a set of applications.").

⁸¹ See Miller, *supra* note 54, at 464 ("One of the substantive rights that only confidentiality can protect is the right to privacy.").

⁸² *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

⁸³ James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1183 (2004) ("Rather than talking about ill-defined social norms, German jurists accordingly embarked on an impressive reinterpretation of . . . the ancient . . . law of insult, which they combined with the law of artistic property to create a new body of personality law . . . it exercised an important influence on American scholars like Warren and Brandeis.").

⁸⁴ PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO*, 82 (2008) ("The goal of the Levellers was 'the right, freedom, safety, and well-being of every particular man, woman, and child in England.' Magna Carta became 'the Englishman's legal birthright and inheritance.' Lilburne said, 'the liberty of the whole English nation' is in Chapter 39.").

⁸⁵ Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1414 (1974) ("Inalienable rights, cited in the Declaration of Independence, were presumably 'natural rights' to which all are entitled under any form of government and do not necessarily depend on the principle of popular sovereignty.").

unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—.”

The European colonists may have embraced ideas considered revolutionary in 1776, but they did not invent them.⁸⁶ They were referencing hundreds of years of European class antagonism codified in the Magna Carta and Charta de Foresta.⁸⁷ English history is rife with uprisings in protest against the monarchy’s attempts to return to its pre-Magna Carta and Charter of The Forest powers.⁸⁸ Those truths that were self-evident to the early colonists—then applicable only to white male property owners—⁸⁹are today often seen as dispensable for the sake of security and safety,⁹⁰ luxuries we

⁸⁶ Herbert A. Johnson, *The English Revolution and the Rule of Law In Revolutionary New York: Jay, Livingston, Morris, and Hamilton*, Paper delivered at a conference: Columbia’s Legacy: Friends and Enemies in the New Nation, Columbia University and the New-York Historical Society, (December 10, 2004) at 3, available at http://www.columbia.edu/cu/lweb/conferences/2004/john_jay/pdf/Johnson.pdf (“[O]ur so-called Founding Fathers held the strong conviction that in their day the English constitution was being subverted, not only in the colonies but also in the Mother Country. For many of them rebellion was not a rejection of the English constitution, but rather the only means available whereby they might preserve those aspects of English government and law which they held most precious.”).

⁸⁷ See LINEBAUGH, *supra* note 84, at 38 (“A charter was a material object with a physical history. At seventeen and three-quarters inches wide and eighteen and one-quarter inches long...”) (“We should quote the preface to the second of Coke’s *Institutes of the Laws of England* (1642): ‘... *Charta de Foresta* is called *Magna Charta de Foresta*, and both of them are called *Magnae Chartae Libertatum Angliae*’—the great charters of English liberties. They were published by reading aloud four times a year, at the Feast of St. Michael’s, Christmas, Easter, and the feast of St. John’s. They were read in Latin certainly, in Norman French translation probably, and in English possibly.”).

⁸⁸ See *id.* at 136 (“The working class in England . . .—from the radicals of the 1790’s to the Chartists of the 1830’s—was by no means ready to ignore the particulars of the commons allowed by Magna Carta.”).

⁸⁹ Frederick Douglass, SPEECH, Rochester, New York Corinthian Hall, (July 5, 1852), <http://www.lib.rochester.edu/index.cfm?page=2945> (last visited Feb. 16, 2012) (“The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me. This Fourth July is yours, not mine. You may rejoice, I must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony.”).

⁹⁰ Mary Minow, *The USA PATRIOT Act*, LIBRARY JOURNAL, Oct. 1, 2002, at paragraph 2, available at <http://www.libraryjournal.com/article/CA245044.html> (last visited Feb. 16, 2012) (“Supporters of the Patriot Act say they’re not against civil

think we can no longer afford.⁹¹ It is a significant occasion indeed, when we are offered the opportunity to exercise such precious rights in mediation.

While scholars contribute to an ongoing effort to define privacy in the legal sense, citizens continue to believe in the right to privacy as a given.⁹² This belief remains strong despite a profound lack of knowledge about its origins or current meanings, inside and outside the courtroom.⁹³ Indeed, the belief in these rights still forms the basis of our national mythology,⁹⁴ if not our reality.⁹⁵ Few participants in mediation would be able to articulate the concept of natural rights over positivism⁹⁶ as the basis for their beliefs that certain rights are inalienable, pre-dating governments.⁹⁷ Most Americans would be unable to reference Magna Carta Chapter 39⁹⁸ to invoke their rights, yet it is the basis of many of these rights guaranteed in the Constitution.⁹⁹

liberties, but public safety requires granting the government greater surveillance powers . . . Privacy advocates, including many library professionals, say we need national security and public safety but not at the expense of our rights as citizens.”).

⁹¹ Marc Rotenberg, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115, 1135 (2002) (“Most critically, we must oppose the fatalism that has captured the minds and hearts of too many Americans. We should reject the premise that after September 11 we can no longer afford the privacy or freedom that we previously enjoyed.”).

⁹² Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36 (1967) (“Privacy, no less than good reputation or physical safety, is a creature of life in a human community and not the contrivance of a legal system concerned with its protection.”).

⁹³ See SCHEINGOLD, *supra* note 62, at 14 (“The focus of the myth of rights is preeminently on courts and on the maintenance of a stable system of rules.”).

⁹⁴ See *id.* at 17 (“The myth of rights . . . like other ideologies seeks to be all things to all people—or at least as many things to as many people as possible.”).

⁹⁵ See *id.* at 61 (“In the final analysis it is not the accuracy of the image but its attractiveness, that determines the success of the myth of rights.”).

⁹⁶ See Brest, *supra* note 38, at 1297 (“The tension between positivism and natural law has been a perennial theme in American constitutional jurisprudence . . . The debate has centered on the extent to which the Justices may protect interests or rights beyond those mentioned in the document.”).

⁹⁷ See *id.* at 1296.

⁹⁸ See LINEBAUGH, *supra* note 84, at 45 (“Chapter 39 has grown to embody fundamental principles, habeas corpus, trial by jury, prohibition of torture.”).

⁹⁹ See *id.* at 179 (“[T]he principles of Magna Carta appear in the provisions of the U. S. Constitution concerning the jury and habeas corpus. As the Constitution was amended, particularly by the Fifth (due process of law in federal cases), the Eighth (prohibition of cruel and unusual punishment), and the Fourteenth (due process of law in state cases), the authority of Magna Carta in American jurisprudence deepened.”).

The existence of privacy rights in ADR processes, both in relation to the state and in relation to other parties (even members of a family), is the basis for offering confidentiality in mediation. Protection of a "sphere of private autonomy"¹⁰⁰ is extolled as a reason to engage in mediation. Privacy is in place when agreeing to mediate. Various aspects of the right to privacy are present in mediation as they are in court, such as: protection from invasion by the federal government through search and seizure, the right not to incriminate oneself, the right to be free of invasion into one's personal affairs by other citizens, and the freedom to make decisions about intimate relationships, about children, and/or about our bodies.¹⁰¹ The rights of privacy that would be in place in a court room also apply in mediation and should receive the same protection. Unlike a courtroom, however, if mediators probe for information that goes beyond the bounds of relevancy,¹⁰² the parties themselves must determine what to disclose.¹⁰³ How can parties in mediation determine what is and is not relevant? What is required to be disclosed by the parties prior to and during mediation? What may parties discuss outside the mediation?¹⁰⁴ These questions are confronted in

¹⁰⁰ See *Pruneyard*, *supra* note 82 ("The constitutional terms, 'life, liberty and property' do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.") (Marshall, J., concurring).

¹⁰¹ See Gerety, *supra* note 61, at 266 ("All of this comes in the end to a control over the most basic vehicle of self-hood: the body. For control over the body is our first form of autonomy . . . Any plausible definition of privacy, then, whatever the sources of its normative commitments, must take the body as its first and most basic reference for control over personal identity.").

¹⁰² See Pavlich, *supra* note 20, at 723 ("In general, using praise, subtle inflections to indicate unease, probing questions, synopses, and so on, the mediators assert a deliberately understated local authority that 'receives' and shapes 'confessions' in the direction of dispute settlement.").

¹⁰³ See *id.* at 722 ("[D]iscourses are solicited from participants in the mediation process which requires all parties to declare a version of self apropos a dispute (what it did or did not do, why it followed a course of action, what its interests are, the outcomes it desires, where it is prepared to compromise, etc.)").

¹⁰⁴ Sam Jackson, *What Is Confidential In Virginia Now?*, Virginia Mediation Network Conference Packet 13 (October, 2002) (on file with the author) ("The parties sometimes want more privacy for communications and information in a mediation than is provided by the statute. In a business matter, for example, disputants often need assurances that trade secrets or other sensitive business information will not be disseminated outside the mediation session by the parties. In a family case, the parents may wish to limit with whom a party may discuss sensitive matters raised in a mediation.").

mediation every day by separating couples, corporations and consumers, employers and employees, landlords and tenants, etc., often without benefit of legal counsel or an understanding of the legal parameters of the mediation process.

Having a right to privacy in mediation does not mean that maintaining confidentiality is always in the best interests of all the parties, or of society in general.¹⁰⁵ While corporations, in the hopes of preventing public disclosure of damaging information,¹⁰⁶ have a long history of preferring private negotiation to the public arena of the court,¹⁰⁷ it does not necessarily follow that consumers or employees benefit from pre-dispute clauses that preempt their access to the courts.¹⁰⁸ Alternative Dispute Resolution (ADR) processes that claim to provide court reform by “informalizing” justice¹⁰⁹ blur the distinctions between what is public and what is private.¹¹⁰ Information that

¹⁰⁵ See Leatherbury and Cover, *supra* note 4, at 2224 (“[C]onfidential non-binding mediation is inconsistent with a policy of open government because, although the public agency need not accept the mediator’s resolution, if it does choose to accept it, the process of reaching that resolution has been removed from public scrutiny.”).

¹⁰⁶ Pam Martens, *Millions of Americans Pushed Into No-Law System by Colluding Banks*, COUNTERPUNCH, August 3, 2009, available at <http://www.counterpunch.org/Martens08032009.html> (last visited Feb. 16, 2012) (“[T]he same Wall Street banks who shackled their stockbrokers to mandatory arbitration clauses and used at least one of these compromised arbitration forums when employees blew the whistle; were the same investment firms that forced their investing customers into mandatory arbitration forums as a condition of opening a brokerage account.”).

¹⁰⁷ See AUERBACH, *supra* note 64, at 33 (“In 1768, the New York Chamber of Commerce established the first private tribunal in America for extra-judicial settlement of commercial disputes. ‘All controversies,’ the Chamber insisted, ‘are antagonistic to commerce.’”).

¹⁰⁸ See Weston, *supra* note 4, at 600 (“[T]he use and enforcement of form-compulsory ADR or predispute binding arbitration clauses that increasingly appear in ordinary consumer transactions, medical service provisions, and employment contracts . . . not only preclude access to public courts but also may set the terms of the ADR process.”).

¹⁰⁹ See ABEL, *supra* note 17, at 6 (“Where formal institutions are largely passive and reactive, informal institutions can be purposive and proactive. They obliterate the fundamental liberal distinction between public and private, state and civil society, what is forbidden and what is allowed. In order to facilitate this expansion, they carefully cultivate the appearance of being noncoercive.”).

¹¹⁰ See Reuben, *supra* note 15, at 579–80 (“[T]he age-old public/private distinction in law is proving more challenging than ever. Governmental contraction is leading to the privatization of many government functions, while private conduct is increasingly taking on public characteristics.”).

the public is entitled to know¹¹¹ is exchanged behind closed doors.¹¹² In such informal processes, parties are left to decide what is private and what must be disclosed, often without benefit of legal counsel.¹¹³

Despite agreement that there are areas into which government may not tread, vast differences exist among scholars in defining which areas are public and which are private. Liberals subscribe to the view that sexuality, marriage, and family, are private¹¹⁴ while conservatives see the economy as private.¹¹⁵ In mediation, determining what is public and what is private references both the constitutional protections of privacy from government intrusion and the tort protection from intrusion by other people. Parties in some states have the option to decide whether to maintain or waive¹¹⁶ confidentiality in relation to the court. A signed agreement to mediate is used by most mediators, prior to mediation, to spell out the responsibilities and

¹¹¹ See Miller, *supra* note 54, at 429 (“[T]he right of public access to court proceedings and records derives from our English common law heritage. It exists to enhance popular trust in the fairness of the justice system, to promote public participation in the workings of government, and to protect constitutional guarantees.”).

¹¹² See Reuben, *supra* note 15, at 639 (“The processes are removed from public witness, negating any possibility the dispute’s resolution will have any public educational or deterrent value. More importantly perhaps, there is no mechanism for ensuring that society’s laws are accurately administered.”).

¹¹³ Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999) (“The rules primarily prohibit clerks, mediators, and other court players from giving legal advice to unrepresented litigants. In theory, the prohibition is intended to protect the unrepresented litigant from receiving legal advice from someone not qualified to give such advice. In practice, however, the prohibition deprives the unrepresented litigant of the opportunity to obtain legal advice throughout the course of the proceeding.”).

¹¹⁴ Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1430 (1982) (“[L]iberal Democrats would characterize a broad range of activities concerning sexuality and marriage as ‘private.’ They argue that in this sphere the state should facilitate private ordering and avoid regulation, especially regulation based on moralistic or paternalistic grounds.”).

¹¹⁵ See *id.* at 1432 (“Conservatives emphasize the importance of private property, and see the market as an institution that appropriately rewards talent and contributes to economic efficiency. Various governmental programs to redistribute economic resources are generally disfavored as interfering with private enterprise.”).

¹¹⁶ See Jackson, *supra* note 104, at 7 (“‘[W]aiver’ . . . by definition is a ‘knowing and intelligent’ relinquishment of rights.”).

requirements of parties and mediators. These agreements are contracts¹¹⁷ whose purpose it is to address the intention of all parties to negotiate in good faith, and to clarify confidentiality in relation to the court and other people. While the right to consult an attorney is generally assumed or specifically mentioned in agreements to mediate, parties can also stipulate other advisors with whom they may discuss what occurs during the mediation. Parties should be free to seek advice and counsel, not only from attorneys, but also from financial advisors, counselors, or members of their support network,¹¹⁸ whose guidance would help them gain necessary information and perspective to make better decisions.¹¹⁹ The tort aspect of privacy requires that parties name those from whom they wish to seek information, advice, and support. Once the parties have named their consultants in the agreement to mediate, discussing the mediation with anyone else becomes a breach of contract.

During divorce mediation, couples are attempting to reestablish separate lives as individuals. What is private and what is public (what is “public” becomes what must be shared with the other partner) particularly in joint custody arrangements,¹²⁰ becomes a constitutional tightrope. Parents have a right to know where their child is and with whom, to know the child’s health and safety are maintained. At the same time, separating couples again become individual entities with equal rights,¹²¹ including the right to keep personal information private. While the couple relationship ends upon divorce (or separation in unmarried couples), the parenting relationship

¹¹⁷ See Kirtley, *supra* note 1, at 5–6 (“In contrast to adjudicatory forms of dispute resolution—hearings, arbitration and trials—mediation is a contractarian process.”).

¹¹⁸ See Jackson, *supra* note 104, at 6 (“Some mediators tell disputants that what is said in mediation cannot be discussed with anyone else. Yet, a confidentiality rule that prevents the disputants from discussing communications heard—and information learned—in the mediation with anyone else might undermine the goal of assuring that the parties make *informed* decisions.”).

¹¹⁹ See Nolan-Haley, *supra* note 8, at 776 (“The absence of truly educated decisionmaking means that mediation may very well result in uninformed and potentially harmful results.”).

¹²⁰ MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT*, at 40 (1999) (“As New York Judge Felicia K. Shea observed: ‘Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes.’”) (quoting *Dodd v. Dodd*, 93 Misc.2d 641, 643 (1978)).

¹²¹ See *id.* at 18 (“Biological parenthood, not marriage or nurture, defines parental rights. The law must treat biological mothers and fathers as equals.”).

usually continues. Children¹²² walk a constitutional tightrope as they shuttle between two environments ("homes"), attempting to figure out what they can and can't say to each parent, potentially withholding more and more information if the level of conflict between the parents remains high. The state also has a prominent role in divorce and custody issues under the doctrine of *parens patriae*.¹²³ While some may think of the family as a sphere of private life and decision making, the state has long maintained its right to regulate behavior of family members and to override parents' decisions through social welfare agencies and the courts.¹²⁴ Use of standards that cannot be quantified, such as the best interests of the child,¹²⁵ give government agencies enormous power over families.¹²⁶ Prior to reaching a court hearing, parties filing petitions for custody, visitation, and/or child support may encounter a barrage of court-appointed surrogates such as

¹²² Jonathan Montgomery, *Children As Property*, 51 THE MODERN L. REV. 323, 342 (1988) ("Disputes about the extent of parental rights raise issues concerning the interests of children . . . arguments may be about the rights of adults, with no reference to the children. 'The object (I would like to call her or him a person but this is hardly permissible) is curiously dehumanized to the point of becoming like a piece of land over which there is a boundary dispute.") (quoting M.D.A. Freeman, *Towards a Critical Theory of Family Law*, 38 CURRENT LEGAL PROBS. 153, 159 (1985)).

¹²³ STEVEN L. SCHLOSSMAN, LOVE & THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF 'PROGRESSIVE' JUVENILE JUSTICE, 1825-1920, 8 (1977) ("From the creation of reformatories in the 1820's to the establishment of juvenile courts three-quarters of a century later, the principal legal justification was the doctrine of *parens patriae* . . . A medieval English doctrine of nebulous origin and meaning, *parens patriae* sanctioned the right of the Crown to intervene into natural family relations whenever a child's welfare was threatened.").

¹²⁴ Frank I. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1356 (June 1982) ("It has been common forever to speak of the public functions of the family in producing and socializing 'the next generation.' Using this and other rationales, the state attempts to determine the content of and then enforce performance of familial roles, both of parents and of children.").

¹²⁵ See *id.* ("Modern statutory schemes authorize social welfare agencies backed by courts to intervene on no more precise grounds than 'the best interests of the child' or the child's 'need for supervision.'").

¹²⁶ W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN, 53 (1982) ("Embedded in this conception of the state's responsibility for children is an instrumental view: children are valued not for the individuals they are, but as instruments in achieving other goals—economic growth, the reduction of welfare costs, stable and fluid labor markets, a high level of profits, social peace.").

guardians *ad litem*, psychological evaluators,¹²⁷ parent educators, and ADR practitioners, who have varying levels of access to private information¹²⁸ and who may have power regarding the decisions.¹²⁹

B. Defining Privacy

The American judiciary has wrestled with the right to privacy for over one hundred years. In 1890 the *Harvard Law Review* published *The Right to Privacy*¹³⁰ by Samuel D. Warren and Louis D. Brandeis, a milestone in the development of privacy law. Warren and Brandeis felt compelled to write their article in the context of enormous technological changes in photography and printing.¹³¹ The article addressed the tort concept of privacy: what protections do we have from invasion into our private sphere by others? They asserted that the law had evolved from recognizing "corporeal property" to "incorporeal rights" from which "there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks."¹³² The authors cited Judge Cooley's phrase, "the right 'to be let alone'"¹³³ as the basis for their

¹²⁷ E. Ruth Bradshaw & Robert W. Hinds, *The Impact of Client and Evaluator Gender on Custody Evaluations*, 35 FAM. & CON. CTS. REV. 317, 318 (July 1997) ("An important part of the evidence presented to the court in custody matters is the evaluation report, which is said in many instances to be valued by the judiciary . . . The report is designed to be an appraisal of the family, written from a social science perspective.").

¹²⁸ See GRUBB & LAZERSON, *supra* note 126, at 13 ("[Americans] have consistently articulated the sanctity of the private family and reaffirmed private responsibility for childrearing in order to 'strengthen the family;' at the same time they have adopted policies and supported institutions that claim public responsibility, 'replace' the family, and assert that families cannot be private.").

¹²⁹ See ABEL, *supra* note 17, at 4 ("The social status of professionals . . . tends to be a function of the power they exercise over people and resources...once the alternatives are in business, their staff develop a 'professional' stake in increasing caseload, expanding jurisdiction, fostering dependence by the lay public, exaggerating the level of their own technical skills, limiting membership, etc.").

¹³⁰ Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 193 (1890).

¹³¹ See Gormley, *supra* note 69, at 1350 ("Linotypes and faster presses were available by the 1870's, along with more striking typography, color printing, cartoons and photographs. Format changed dramatically from the pre-Civil War papers, allowing two, three and even eight-column banner headlines to be spread across the front page.").

¹³² See Warren & Brandeis, *supra* note 130, at 194-95.

¹³³ See *id.* at 195.

argument. Warren and Brandeis saw the existing law of defamation as inadequate, as it pertained only to material injuries. Their claim was that the “individual is entitled to decide whether that which is his shall be given to the public.”¹³⁴ Ultimately they went beyond the analogy to property, naming a principle of “inviolate personality.”¹³⁵ Warren and Brandeis’ 1890 article continues to be a reference point for case law, legislation, and legal scholarship in attempting to define and clarify the nature of tort privacy.¹³⁶

In the early twentieth century Roscoe Pound took an approach similar to the Europeans: a breach of privacy was an insult to one’s honor, a principle going back to Greek and Roman law.¹³⁷ In Europe the principle applied only to persons of elevated status; the middle and working classes were not considered to have any honor to defend.¹³⁸ European privacy law has evolved to grant all persons the respect and dignity that were once held only by the wealthy and well-born.¹³⁹ Although in the U.S. the definition of privacy as “inviolate personality” adopted by Warren and Brandeis overshadowed the European definition of insult, Pound’s perspective is entirely applicable to mediation. Many participants come into mediation because they feel their honor has been impugned. Mediation can offer an opportunity for parties to express recognition of a wrong committed and to

¹³⁴ See *id.* at 199.

¹³⁵ See *id.* at 205.

¹³⁶ See Bloustein, *supra* note 63, at 962 (“Three-quarters of a century have passed since Warren and Brandeis published their germinal article . . . In this period many hundreds of cases, ostensibly founded upon the right to privacy, have been decided, a number of statutes expressly embodying it have been enacted, and a sizeable scholarly literature has been devoted to it. Remarkably enough, however, there remains to this day considerable confusion concerning the nature of the interest which the right to privacy is designed to protect.”).

¹³⁷ Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 357 (1915) (“In Greek law every infringement of the personality of another is . . . (*contumelia*); the injury of honor, the insult, being the essential point, not the injury to the body. In Roman law, injury to the person is called *iniuria*, meaning originally insult, but coming to mean any willful disregard of another’s personality.”).

¹³⁸ See Whitman, *supra* note 83, at 1165–66 (“Indeed, well into the twentieth century, only high-status persons could expect to be treated respectfully in the daily life of Germany or France, and only high-status persons could expect their ‘personal honor’ to be protected in continental courts. Members of the lower orders—the vast majority of the population—certainly had no meaningful right to respect. Quite the contrary.”).

¹³⁹ See *id.* at 1166.

make amends.¹⁴⁰ Most mediators have witnessed the power of apology in resolving disputes.¹⁴¹

American privacy law has gone in two directions, one dealing with protection from invasion by the state,¹⁴² the other from invasion by other people.¹⁴³ Some scholars maintain that without the protection of privacy, all human relationships are vulnerable,¹⁴⁴ arguing that protection from unwanted intrusion by others is “the very essence of freedom and dignity.”¹⁴⁵ Each of us has the right to choose our confidants and closest allies.¹⁴⁶ We depend upon the character and promise of those people in whom we confide, to hold what we have said in confidence. Without such safeguards, we might be

¹⁴⁰ Jonathan Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry Into Justice In Mediation*, 9 CLINICAL L. REV. 166, 167 (2002–03) (“The recognition and remorse that underlie apology can arise through the dialogue made possible by mediation and the richer understanding of the situation such dialogue can generate.”).

¹⁴¹ Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 MED. Q. 213, 266 (2000) (“[W]e in a real sense *lose face* when done a moral injury . . . But our moral relations provide for a ritual whereby the wrongdoer can symbolically bring himself low—in other words, the humbling ritual of *apology*, the language of which is often that of *begging* for forgiveness.”) (quoting MURPHY & HAMPTON, FORGIVENESS AND MERCY (1988)).

¹⁴² ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY, xv–xvi (1995) (“[A]lthough the word ‘privacy’ is not specifically mentioned in the Constitution, our right to be free from unreasonable searches and seizures is. The Fourth Amendment has been interpreted as protecting our privacy at least against government officials, and as such it is the most direct constitutional safeguard for privacy.”).

¹⁴³ Stanley J. Benn, *Privacy, Freedom and Respect for Persons*, in PRIVACY, 24 (J. Roland Pennock & John W. Chapman, eds.) (1971) (“It is not only the authorities we fear. We are all under strong pressure from our friends and neighbors to live up to the roles in which they cast us. If we disappoint them, we risk their disapproval, and what may be worse, their ridicule. For many of us, we are free to be ourselves only within that area from which observers can legitimately be excluded. We need a sanctuary or retreat, in which we can drop the mask.”).

¹⁴⁴ Charles Fried, *Privacy*, 77 YALE L.J., 475, 477 (1967–1968) (“[P]rivity is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy or the possibility of privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence.”).

¹⁴⁵ See Bloustein, *supra* note 63, at 974 (“He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.”).

¹⁴⁶ See Baker, *supra* note 50, at 1177–78 (“The identification of personal relationships as an aspect of privacy to be protected provides a substantive, privacy-related content for the Court’s privacy analysis.”).

loath to share ourselves with anyone.¹⁴⁷ Thus, a most basic human right is to be found in controlling information about ourselves,¹⁴⁸ to decide with whom we share personal information.¹⁴⁹ These principles are in many ways discordant with the confidentiality agreements parties are required to make in mediation, not with trusted confidants, but with their adversaries!¹⁵⁰ The autonomy¹⁵¹ to make decisions about what information we share and with whom, is a critical element of self-determination in mediation. Thus, the right to privacy in mediation is exercised by parties if they understand the consequences of their choices and can weigh the risks¹⁵² against the benefits of sharing information, as they endeavor to make informed decisions.¹⁵³

¹⁴⁷ Edward J. Eberle, *The Right To Information Self-Determination*, 2001 UTAH L. REV. 995, 996 (2001) ("Personal information is not only an important ingredient to our conceptions of ourselves. Since others form judgments about us based upon what they know of us, our personal information is also significant in determining these judgments. For these reasons, people need certain control over the core attributes of their personal identities.").

¹⁴⁸ See Fried, *supra* note 144, at 483 ("[P]rivacy in its dimension of control over information is an aspect of personal liberty.").

¹⁴⁹ See *id.* at 485 ("[E]ven between friends the restraints of privacy apply; since friendship implies a *voluntary* relinquishment of private information . . .").

¹⁵⁰ See Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, *supra* note 1, at 245–46 ("[A] privilege enhances candid communication by building on an existing foundation of trust that is inherent in a consultation with an advisor. Mediation, in contrast, involves adversary parties whose relationship is often characterized at the outset by a high level of distrust.").

¹⁵¹ BECKY COX WHITE, COMPETENCE TO CONSENT 15, 16 (1994) ("Autonomy is important to decision making because choices are opportunities to act on values. Since autonomy has to do with principled decision making, autonomous choices have three characteristics: They are *informed* (i.e., the choice is made by someone who possesses the material data); *made with understanding* (i.e., the choice is made after the material data have been considered and their impact appreciated); and *uncoerced* (i.e., the choice is freely made rather than being forced on the decision maker).").

¹⁵² W. A. Parent, *Privacy, Morality and the Law*, 12 PHIL. & PUB. AFF. 269, 276 (1983) ("[I]f others manage to obtain sensitive personal knowledge about us they will by that very fact acquire power over us. Their power could then be used to our disadvantage. The possibilities for exploitation become very real. The definite connection between harm and the invasion of privacy explains why we place a value on not having undocumented personal information about ourselves widely known.").

¹⁵³ See Nolan-Haley, *supra* note 8, at 781 ("The principle of informed consent is the vehicle through which autonomy is measured in decisionmaking.").

C. Constitutional Protections of Privacy

As U.S. citizens and residents continue to trust that the rights guaranteed in the Constitution—particularly in the Bill of Rights—are firmly established in our legal system, there is considerable difficulty in actually defining when these rights are in effect.¹⁵⁴ Scholars have argued for many years that these rights, based originally on protection of private property,¹⁵⁵ do not always serve the social good.¹⁵⁶ As changes in the law occurred, the concept of protection of individual rights¹⁵⁷ gave way to the idea of protecting the interests of citizens,¹⁵⁸ thereby balancing the individual's privacy right, historically seen as a property right, with competing social interests.¹⁵⁹

It was only after the Civil War with the passage of the Thirteenth and Fourteenth Amendments that the property rights of slave owners were abolished in all states by the creation of a constitutional right not to be

¹⁵⁴ See Baker, *supra* note 50, at 1163 ("One of the major failings of the Court has been its treatment of privacy as a self-explanatory, unitary concept, when in fact one or more of a number of distinct meanings may lie behind a claim to privacy protections.").

¹⁵⁵ Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 950, 951 (1977) ("According to Blackstone, 'So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of the whole community.'").

¹⁵⁶ See *id.* at 948 n.23 ("No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual, and for the entrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual.") (citing Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 344 (1905)).

¹⁵⁷ See Pound, *supra* note 137, at 346 ("Individual interests which it is conceived the law ought to secure are usually called 'natural rights' because they are not the creatures of the state Those which are secured and the means whereby they are secured are called legal rights; those which ought to be secured are called natural rights.").

¹⁵⁸ See Note, *supra* note 155, at 980 ("This shift is consistent with the legal realist premise that the task of the courts is not so much to protect the rights of individual defendants as to safeguard the 'interest' of citizens generally in being free from arbitrary government intrusions.").

¹⁵⁹ See *id.* at 966 ("Balancing and accommodating competing societal interests in the pursuit of compromise and expediency emerged as the keynote of the realist approach. No longer could the judiciary hide behind the façade of essentially indeterminate deductions from so-called absolute moral principles in order to force upon society its own values and thereby obstruct progress toward maximum social efficiency.").

enslaved.¹⁶⁰ With the adoption of the Fourteenth Amendment the Court also created the principle of “selective incorporation,” holding that fundamental rights granted in the Bill of Rights were incorporated into the Fourteenth, and therefore applied to the states.¹⁶¹ With the *Griswold v. Connecticut* decision in 1965,¹⁶² the protection went beyond freedom from intrusion by the government, to freedom from regulation by the government.¹⁶³ However, defining some rights as fundamental¹⁶⁴ but not absolute makes it difficult to know which rights are fundamental and what remedies the assault on these rights may provide¹⁶⁵ when balanced against the public good.¹⁶⁶

¹⁶⁰ See Henkin, *supra* note 85, at 1411 (“Significant judicial monitoring of governmental accommodation of private rights to public goods came only after the Civil War: after the essential private right—freedom—was finally established by the thirteenth amendment; after the fourteenth amendment commanded the principal arbiters of that accommodation—the states—not to deny the equal protection of the laws or due process of law.”).

¹⁶¹ See *id.* at 1418 (“In the end, the Court adopted a doctrine of ‘selective incorporation’: those provisions of the Bill of Rights that are ‘fundamental’ (and almost all are, surely the ‘preferred liberties’ of the first amendment); are incorporated in the fourteenth amendment, and are applicable to the states.”).

¹⁶² *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *GRISWOLD v. CONNECTICUT*, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/1960-1969/1964/1964_496 (last visited March 12, 2012). (“Though the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. Together, the First, Third, Fourth, and Ninth Amendments, create a new constitutional right, the right to privacy in marital relations. The Connecticut statute conflicts with the exercise of this right and is therefore null and void.”).

¹⁶³ See Henkin, *supra* note 85, at 1424 (“In a word, the Court has been vindicating not a right to freedom from official intrusion, but to freedom from official regulation.”).

¹⁶⁴ See *id.* at 1428 (“Whether as substantive due process or as Privacy, ‘fundamentality’ needs elaboration, especially with respect to the weight particular rights are to enjoy in the balance against public good.”).

¹⁶⁵ See Pound, *supra* note 137, at 365 (“Next to property in corporeal things, the interest in body and life is on the whole the interest most completely capable of legal protection. But the practical limitations are considerable . . . with respect to merely mental injuries, the danger of imposture, the difficulty, if not impossibility, of satisfactory proof, and the difficulty of devising adequate redress stand in the way of complete securing by law of an interest which the law is quite willing to recognize fully.”).

¹⁶⁶ See Henkin, *supra* note 85, at 1430 (“Especially now that we have added a new, expandable zone of autonomy, fundamental but not absolute, a jurisprudence of balancing of rights and goods cries for thinking about public goods. The Court has not told us which assertions of governmental authority promote purposes that are not

In determining the basis for the right to privacy¹⁶⁷ in mediation, we are referencing multiple sources: federal and state constitutional protections from invasion by the government, federal and state statutes, common law, and Supreme Court decisions. These legally established safeguards of rights presumed to be inalienable¹⁶⁸ are protected by the state.¹⁶⁹ Confidentiality in mediation offers protection from intrusion by the state and gives parties control over what information they chose to give to others.¹⁷⁰ Thus, the right to privacy, whether it is called “inviolate personality” or autonomy,¹⁷¹ is inherent in the voluntary aspect of mediation on the most basic level: that of the liberty to make personal choices that define who we are and how we live our lives, every day.¹⁷² The claim to an autonomous self, making informed

permissible, or not public, or not good, which public goods are ‘insufficient,’ which ‘acceptable,’ which are ‘compelling.’”).

¹⁶⁷ Jeffrey H. Reiman, *Privacy, Intimacy & Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976) (“[P]rivacy is necessary to the creation of *selves* out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his *own*.”).

¹⁶⁸ See Henkin, *supra* note 85, at 1414 (“Presumably, these rights, retained and inalienable, are not necessarily absolute but may be outweighed by a sufficient public good.”).

¹⁶⁹ Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 438 (1980) (“[T]he typical privacy claim is not a claim for noninterference by the state at all. It is a claim *for* state interference in the form of legal protection against other individuals, and this is obscured when privacy is discussed in terms of noninterference with personal decisions.”).

¹⁷⁰ DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW*, at 1 (2003) (“Information privacy concerns the collection, use and disclosure of personal information Information privacy increasingly incorporates elements of decisional privacy as the use of data both expands and limits individual autonomy.”).

¹⁷¹ See Henkin, *supra* note 85, at 1425 (“Primarily and principally the new Right of Privacy is a zone of *prima facie* autonomy, of presumptive immunity from regulation, in addition to that established by the first amendment. The zone, Justice Blackmun told us, consists of ‘personal rights’ that can be deemed ‘fundamental’ that are ‘implicit in the concept of ordered liberty.’”).

¹⁷² Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 801, 802 (1989) (“The point is this: child-rearing, marriage and the assumption of a specific sexual identity are undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the body, inform values, and in sum substantially shape the totality of a person’s daily life and consciousness. Laws, that force such undertakings on individuals may properly be called ‘totalitarian,’ and the right to privacy exists to protect against them.”).

decisions—though defined differently by liberals and conservatives¹⁷³—exists for every adult before, during, and after mediation.

As programs using ADR continue to proliferate,¹⁷⁴ concerns about the lack of due process safeguards¹⁷⁵ have been raised. When mediation is court-referred or court-ordered, parties believe themselves to be under the authority¹⁷⁶ of the court. Theoretically, there is regulation and supervision¹⁷⁷ of those mediators whose caseloads are, to a considerable extent, court-referred.¹⁷⁸ In private mediation, however, negotiations are conducted behind closed doors¹⁷⁹ with much less oversight. Parties may be subject to pressures

¹⁷³ See *id.* at 761–62 (“Liberalism is grounded in a conception of *individual* self-government. Its institutions are designed primarily to secure individual autonomy: the freedom of each to choose and pursue his own ends, limited only by the principle that others must be free to do likewise. By contrast, the ‘self’ that is to govern itself in the republican understanding is a political or communal entity. Republican political institutions are designed with a view to substantive popular participation, republicanism sees liberty as an active and supra-individual condition, a distinctly human potential realizable only through participation in political self-government.”).

¹⁷⁴ See Engler, *supra* note 113, at 2031–32 (“[C]ourts increasingly are turning to mediation in an effort to maintain docket control Reports of high settlement rates and litigant satisfaction with the process provide justification for, and added momentum to, the call for more court-connected mediation.”).

¹⁷⁵ See Reuben, *supra* note 15 (“[A] troubling aspect of ADR is . . . the absence of even the most basic procedural safeguards, such as the right to counsel and the right to present evidence on one’s behalf.”).

¹⁷⁶ Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805 (1995) (“The term ‘inherent authority’ . . . means the authority of a trial court, whether state or federal, to control and direct the conduct of civil litigation without any express authorization in a constitution, statute or written rule of court. This authority, in other words, flows from the powers possessed by a court simply because it is a court.”).

¹⁷⁷ See Thompson, *supra* note 31, at 514 (“The courts’ reluctance to supervise the mediation process, for fear that it will become less efficient in getting rid of cases, creates a virtually unregulated enclave of adversarial activity within a process loosely defined as conciliatory and facilitative.”).

¹⁷⁸ See Hensler, *supra* note 49, at 186 (“By the mid-1990’s, more than half of state courts, and virtually all of the federal district courts, had adopted mediation programs for large categories of civil suits.”).

¹⁷⁹ See *id.* at 187 (“The consequence of the widespread adoption by legislatures and court rule of civil case mediation has been the development and growth of a new and largely unregulated industry that operates—by design—behind closed doors.”).

to participate¹⁸⁰ and settle¹⁸¹ in a process managed by those holding themselves out as neutrals, who are accountable to no one,¹⁸² and who maintain that they have no authority.¹⁸³ The conflict between protecting privacy and preserving other legal rights raises significant questions: What information do parties have the right to control in mediation? When is one free from invasion by the federal or state governments, or other people? When must the public good be served by allowing all available evidence?¹⁸⁴ Recognition by mediators and parties of the following privacy protections in place in mediation as well as in court, would alleviate some of the dangers to autonomy, self-determination, and justice in mediation,¹⁸⁵ as it is currently practiced.

1. *Fourth Amendment*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹⁸⁰ See Nolan-Haley, *supra* note 32, at 61 ("Even in programs which are not strictly mandatory, when court personnel encourage parties to mediate, the invitation is not lightly refused. Particularly in unrepresented litigants, such a suggestion from an authority figure can easily be perceived as a command.").

¹⁸¹ See *id.* at 61-62 ("Without lawyers, parties may not recognize the subtle difference between referral to mediation, compulsion to mediate, and friendly coercion to reach a settlement.").

¹⁸² See Thompson, *supra* note 31, at 530-31 ("The parties are then asked or forced to participate in a private, largely-unregulated, consensual process, usually presided over by private citizens or lawyers, essentially responsible to no one.").

¹⁸³ Susan S. Silbey, *Mediation Mythology*, 9 NEGOTIATION. J. 349, 352 (1993) ("Mediation mythology promotes the mistaken notion that mediators are passive participants in a process shaped by forces they have not deployed . . . Although mediators are claimed to act without power, to be unable to impose a decision as judges and arbitrators do, they nonetheless regularly act with authority and power.").

¹⁸⁴ See Kuestar, *supra* note 48, at 577-78 ("[P]rotection offered by confidentiality agreements is illusory. Agreements limiting access to information disclosed in mediation could be declared void as against public policy. Judges are forced to balance the benefits to the public by settling disputes out of court against the current policy favoring court decisions based upon all available evidence.").

¹⁸⁵ See Reuben, *supra* note 15, at 641 ("ADR should be recognized as an expansion of public justice, rather than the establishment of a private alternative to public justice.").

The notion of a man's privacy right within his home,¹⁸⁶ seen as a property right, is attributed to Sir Edward Coke in his statement defending such a right in 1644.¹⁸⁷ In 1761 William Pitt the Elder, speaking about the Excise Bill, said:

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!¹⁸⁸

Thus, the sanctity of the home as codified in the Fourth Amendment references English legal tradition.¹⁸⁹ The Fourth Amendment prevents the federal government from enacting unreasonable search and seizure upon the people. The Third Amendment protects citizens from being forced to quarter soldiers. In 1886 the decision in *Boyd v. United States*,¹⁹⁰ reinforced these principles by upholding the right to protect one's "person, property and papers even against the process of law, except in a few specified cases."¹⁹¹ In 1928 in *Olmstead v. United States*¹⁹² Justice Brandeis dissented from the majority, arguing that wiretapping, while not a physical trespass or seizure of tangible property, was still an illegal search and seizure under the Fourth Amendment. It was not until 1967 in *Katz v. United States*¹⁹³ that the Court found that electronic devices used for surveillance may violate the Fourth Amendment in the same way as an illegal search.¹⁹⁴ In his opinion in *Katz*,

¹⁸⁶ See SOLOVE & ROTENBERG, *supra* note 170 ("[P]rivacy doctrine is most at home at home, the place women experience the most force, in the family . . . This right to privacy is a right of men 'to be let alone' to oppress women one at a time.") (citing CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, at 45–46).

¹⁸⁷ EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND*, chapter 73, p. 162 (1644) ("For a man's house is his castle, & domus sua cuique est tutissimum refugium; for where shall a man be safe, if it be not in his house?").

¹⁸⁸ See Gormley, *supra* note 69, at 1358 (quoting Cooley, J.).

¹⁸⁹ See *id.* at 1358.

¹⁹⁰ *Boyd v. United States*, 116 U.S. 616, 624–29 (1886).

¹⁹¹ See Gormley, *supra* note 69, at 1359.

¹⁹² *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

¹⁹³ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁹⁴ Peter G. Madrinan, *Devil in the Details: Constitutional Problems Inherent in the Internet Surveillance Provisions of the USA PATRIOT Act of 2001*, 64 U. PITT. L. REV. 783, 784 (2003).

Justice Stewart asserted that the Fourth Amendment “protects people, not places.”¹⁹⁵

Application of Fourth Amendment protection to mediation allows parties to keep what is said in mediation from being presented as testimony in court, thus preventing government invasion into private matters. Most states have passed legislation granting confidentiality in mediation.¹⁹⁶ Many state codes and court rules on mediation grant sanctuary from invasion by the state in the protection of confidentiality. However, many confidentiality statutes have stipulations that allow the court to override it.¹⁹⁷ The offer of confidentiality raises Fourth Amendment issues since parties must agree to mediate in good faith—which includes the willingness to provide all relevant information¹⁹⁸—but in general mediation fails to define what is relevant. In

¹⁹⁵ *Katz*, 389 U.S. at 351. See also Cornell University Law School Legal Information Institute, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0389_0347_ZS.html (describing the Court’s finding in *Katz* as “[b]ecause the Fourth Amendment protects people, rather than places, its reach cannot turn on the presence or absence of a physical intrusion into any given enclosure. The “trespass” doctrine of *Olmstead v. United States*, 277 U.S. 438, and *Goldman v. United States*, 316 U.S. 129, is no longer controlling.”) (last visited Mar. 18, 2012).

¹⁹⁶ See *supra* note 36.

¹⁹⁷ AL. CIV. CT. MEDIATION R. 10–11; ALASKA R. CIV. P. 100; ARIZ. REV. STAT. § 12-2238 (LexisNexis 1956); ARK. CODE ANN. § 16-7-206 (1987); CAL. EVID. CODE §§ 1119–1124 (West 2012); *id.* at §§ 1126–1128; COLO. CODE REGS. §13-22-307 (2007); CONN. GEN. STAT. §§ 52-235d(b)–(d) (2011); D.C. CODE §16-4203 (2001); GA. R. ADR VII.A; VII.B Appendix A; IDAHO CODE ANN. §§ 9-804–806 (West 2012); 710 ILL. COMP. STAT. 35/4–36/6 (2004); IND. CODE § 4-21.5-3.5-26 (1996); KAN. STAT. ANN. §§ 5-512(a); *id.* at §§ 5-512(b)(1)–(5) (West 2011); KY. ST. CT. MEDIATION R. 12; LA. REV. STAT. ANN. § 4112 (West 2011); ME. R. CIV. P. 16B(k); MD. R. CIV. P. § 17-109; MINN. ST. GEN. PRAC. R. 114.08; MISS. R. MEDIATION FOR CIV. LIT. VII.; MO. S. CT. R. 17.06; MONT. CODE ANN. § 25-21-7(5)(a) (2011); NEB. REV. STAT. §§ 25-2914 (West 2011); *id.* at §§ 25-2935–2936; NEV. REV. STAT. § 48.109 (1991); N.H. SUPER. CT. R. 170(E); N.J. CT. R. 1:40-4(c)–(d); N.M. STAT. ANN. §§ 44-7B-4–5 (West 2011); N.Y. JUD. § 849-b.6; N.C. GEN. STAT. ANN. § 150B-23.1(j) (West 2011); N.D. R. CT. 8.8(d)(1)–(3); OHIO REV. CODE ANN. § 2710.03; *id.* at § 2710.07 (West 2011); S.C. ADR R. 6(e); *id.* at 7(c); S.D. CODIFIED LAWS § 19-13A-6 (West 2011); *id.* at § 19-13A-8; TENN. R. S.C.T. R. 31.7; TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2001); UTAH JUD. CODE ANN. § 78-31c-106 (LexisNexis 2008); VT. STAT. ANN. TIT. § 5717 (West 2010); VA. CODE ANN. § 8.01-581.22 (West 2011); *id.* at § 2.2-4119B; WASH. REV. CODE § 7.07.050 (2006); W.VA. TRIAL CT. R. §25.12; WIS. STAT. ANN. § 904.085(4)(e) (West 2011).

¹⁹⁸ See Kovach, *supra* note 67, at 611 (“[S]ince a primary focus of mediation, whether in a settlement or empowerment context is increased *understanding* and

litigation, attorneys and judges sort out what is relevant and cannot be protected. In mediation, parties, often unrepresented,¹⁹⁹ are left to figure it out on their own.²⁰⁰ Being asked to disclose “all relevant information” to an adversary, often without advice of counsel, and without understanding how the information could be used in court if the mediation does not succeed, puts justice very much at risk in mediation.²⁰¹ It is paradoxical to promise confidentiality in mediation, at the same time essentially suspending other legal rights²⁰²—such as access to the court²⁰³ or use of legal remedies including rules of evidence—if parties do choose litigation.²⁰⁴ When parties

communication, disclosures are necessary. The scope of information to be disclosed, however, remains within the purview of the parties.”) (emphasis added).

¹⁹⁹ See Nolan-Haley, *supra* note 32, at 99 (“Unaware of their legal rights, unrepresented parties may unwittingly surrender them and still profess great satisfaction with the court mediation process.”).

²⁰⁰ See Engler, *supra* note 113, at 2035 (“The fundamental clash between the need to achieve voluntary and informed choices by disempowered and legally unsophisticated litigants without providing sufficient advice or assistance to make the choices truly informed remains a major unresolved dilemma in the context of court-connected mediation.”).

²⁰¹ See Nolan-Haley, *supra* note 32, at 75–76 (“[I]f justice has anything to do with making knowledgeable choices based on an understanding of relevant law, then under court mediation practices justice is serendipitous, depending upon which mediator a disputant draws.”).

²⁰² See *id.* at 63 (“This, then, is the paradox of court-based mediation: Despite the initial search for justice based on an objective standard outside of themselves, namely law, disputing parties are required by courts and coached by mediators to place the locus of decision making in themselves. The result is ‘individualized justice.’ The parties’ original expectations for justice through law have been suspended.”).

²⁰³ See Hensler, *supra* note 25, at 196 (“With increasing barriers to litigating, fewer citizens will find their own way into court . . . Those who are not barred from using the courts by contractual agreement will increasingly find themselves shepherd outside the courthouse to confidential conferences presided over by private neutrals in private venues.”).

²⁰⁴ See *id.* at 172 (“[O]ne study of disputes within a large urban community concluded that many citizens chose to take disputes to court, rather than to more informal dispute resolution institutions, because they valued public vindication of their rights or positions.”).

unwittingly forfeit legal rights,²⁰⁵ another basic mediation principle, that of self-determination,²⁰⁶ is violated.

While the protection of “solitude” or “sanctuary” of individuals inside and outside the home from intrusion by the government has been established under some circumstances,²⁰⁷ it has proven difficult to determine what is “reasonable” or “unreasonable” in others, regarding bank records, automobiles, or in cases involving drugs or alcohol.²⁰⁸ With the passage of the USA PATRIOT Act,²⁰⁹ Fourth Amendment protections are in even greater danger due to the use of warrantless surveillance, ordered by President George W. Bush shortly after the attacks on September 11, 2001.²¹⁰ Bush’s warrantless surveillance policies were continued by President Barack Obama when in 2009 his administration sought renewal of the program from the national security court.²¹¹ Although statutes regulating mediation often include strict limitations preventing mediators from reporting to the court,²¹² the USA PATRIOT Act and other legal processes

²⁰⁵ See *id.* at 189, 190 (“[A] facilitative mediator might suggest that the parties should put aside notions of legal rights and remedies (‘rights talk’) and re-conceptualize their dispute as a *problem* that would be best to solve and then move on.”).

²⁰⁶ See Hedeem, *supra* note 35, at 274 (“The centrality of self-determination in the mediation community cannot be overstated.”).

²⁰⁷ See Gormley, *supra* note 69, at 1368 (“On the pro-privacy side of the equation, the Court over the past two decades—in many different contexts—has protected individual solitude from governmental intrusion, within the castle of the home and beyond.”).

²⁰⁸ See *id.* at 1369–70.

²⁰⁹ USA PATRIOT ACT, H. R. 3162, 107th Congress, § 1 (2001) (“To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, This Act may be cited as the ‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism’”).

²¹⁰ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, A16.

²¹¹ Angie Drobnic Holan, *Warrantless Wiretaps Back in the News*, POLITIFACT (Apr. 17, 2009), <http://www.politifact.com/truth-o-meter/promises/promise/180/end-warrantless-wiretaps/> (last visited Feb. 16, 2012).

²¹² AL. ST. MEDIATION R. 11–12; ALASKA R. CIV. P. 100(g); ARIZ. REV. STAT. § 12-2238B (LexisNexis 1956); Ark. Code Ann. § 16-7-206 (West 2011); CAL. EVID. CODE § 1119 (West 2012); 13 COLO. REGS. § 13-22-307 (2007); CONN. GEN. STAT. §§ 52-235d(b)–(c) (2011); DEL. CT. CH. R.174(c); D.C. CODE § 16-4203(a) (2001); FLA. STAT. ANN. § 44.102(3) (West 2012); GA. R. ADR VII.A; IDAHO CODE ANN. § 9-804 (West 2012); § 710 ILL. COMP. STAT. 35/4 (2004); IND. CODE § 4-21.5-3.5-18 (1996); KAN.

can override mediator privilege.²¹³ Parties in mediation cannot be guaranteed that confidentiality will always be preserved if the mediation fails.²¹⁴ Protecting privacy in mediation requires mediators to know and inform parties of the unpredictability of upholding it.²¹⁵

2. *Fifth Amendment*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STAT. ANN. § 5-512 (West 2011); KY. ST. S.CT. MEDIATION R. 12; LA. REV. STAT. ANN. § 4112 (West 2011); ME. R. 16B(h)(1)–(2); MD. R. CIV. P. § 17-109(a)–(b); MASS. GEN. LAWS ANN. 233 § 23C (West 2011); MICH. MEDIATION CT. R. § 2.411(B)5; MINN. ST. GEN. PRAC. R. 114.08; MISS. R. MEDIATION FOR CIV. LIT. Exhibit A; MO. REV. STAT. ANN. § 435.014 (West 2011); MONT. CODE ANN. §§ 25–21(6) (2011); NEB. REV. STAT. § 25-2914 (West 2011); NEV. ADR R. 11; N.H. SUPER. CT. R. § 170(D)(4); N.J. CT. R. §§ 1:40-4(c)–(d); N.M. STAT. § 44-7B-4 (West 2011); N.C. GEN. STAT. § 150B-23.1(j); N.D. S.CT. R. § 8.8(2)(d); OHIO REV. CODE ANN. § 2710.03 (West 2011); OK. STAT. §§ 1824 5–6 (West 2011); OR. REV. STAT. ANN. § 36.220(a) (West 2012); 59 PA. CODE § 5949(a) (2010); R.I. GEN. LAWS ANN. § 9-19-44(a) (West 2011); S.C. ADR R. 6(e); S.D. CODIFIED LAWS § 19-13A-4 (West 2011); TENN. R. S.CT. 31 § 5(a)(b); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (West 2011); UTAH JUD. CODE ANN. § 78-31c-107 (LexisNexis 2008); VT. STAT. ANN. § 5715 (West 2010); VA. CODE ANN. § 8.01-576.9 (West 2011); WASH. REV. CODE § 7.07.030 (2006); W.VA TRIAL CT. R. § 25.12; WYO. STAT. ANN. § 1-43-103(a)–(b) (West 2011).

²¹³ See *infra* Part IV.

²¹⁴ See Kuestar, *supra* note 48, at 573 (“Mediation clients are often given the mistaken impression, through confidentiality agreements and expressed or implied promises by the mediator, that everything said in a mediation session is confidential and immune from any investigation. This presumption of confidentiality in mediation is based on legal assumptions which do not provide a clear-cut rule.”).

²¹⁵ See Nolan-Haley, *supra* note 32, at 76 (“[U]nder current practices, the influence of law on court mediation is, at best, unpredictable in any given case . . . this imbalance has significant implications for the ultimate fairness of court mediation . . . it is a question that relates to the fundamental fairness of court-instituted procedures that purport to deliver justice.”).

The Fourth and Fifth amendments are seen as offering complementary protections from invasion by the state.²¹⁶ The Fourth Amendment protects against government seizure or use of personal items considered private property; the Fifth Amendment protects against use of books or papers that might incriminate their owner.²¹⁷ The Fifth Amendment is also seen as protecting privacy²¹⁸ by prohibiting the government from compelling confessions of persons under government investigation. Government use of private papers or conversations, gathered in violation of privacy protections, infringes on constitutional rights.²¹⁹ A penalty of exclusion of evidence may be imposed if the state attempts to use illegally obtained evidence.²²⁰

The origin of the protection against self-incrimination stems from abuses of English courts that sought to determine religious and political views of dissidents prior to being accused; the principle eventually extended to all compulsory self-incrimination.²²¹ The restructuring of the criminal trial

²¹⁶ R. Kent Greenawalt, *Silence As A Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 16 (1981) ("Like the Fourth Amendment ban on unreasonable searches and seizures, the privilege against self-incrimination stands as a barrier to the government's acquisition of information about criminal activities.").

²¹⁷ See Note, *supra* note 155, at 955 ("The fourth amendment prohibited the government from seizing and using as evidence the defendant's personal books and papers because they are articles of personal property; the fifth amendment added a second layer of protection for books and papers which might tend to incriminate their owner. 'In this regard,' wrote Justice Bradley, 'the Fourth and Fifth Amendments run almost into each other.'").

²¹⁸ See *id.* at 987 ("Unless the fourth and fifth amendments can be read as putting a premium on the value of personal privacy in the face of government encroachment, it is difficult to imagine what these amendments can mean.").

²¹⁹ See *id.* at 990.

²²⁰ See *id.* at 982 ("[C]onsistent with relativistic assumptions and accommodating methods, the penalty of exclusion will be imposed upon the government only in proceedings in which the Court estimates that the incremental benefits in terms of deterrence are likely to outweigh the incremental costs in terms of lost convictions of guilty defendants. The number of contexts in which the Court will permit exclusion seems to be decreasing with each passing year, and the exclusionary rule may be in danger of total abandonment.").

²²¹ See Greenawalt, *supra* note 216, at 55 ("Claims against compulsory self-incrimination had arisen mainly in reaction to questions about religious orthodoxy and political loyalty that had been put by English prerogative courts to persons who had not been formally accused. Though early assertions of the privilege were cast in terms of the wrongfulness of demanding that people not otherwise accused of crime be required to accuse themselves, these claims had been broadened to cover all formally compelled self-accusation.").

process in the mid-nineteenth century brought about changes that eliminated mandatory testimony by the accused.²²² The establishment of the principle of presumption of innocence and a standard of proof defined as “beyond a reasonable doubt” allowed defendants to choose to remain silent, putting the burden of proof on the prosecution.²²³ These changes in the criminal trial process also include prohibitions against torture or the inference of guilt if a defendant declined to testify.²²⁴ The prohibition against use of force to gain admissions of guilt from the accused is a crucial aspect of Fifth Amendment protection.²²⁵ The protection against self-incrimination is integral to the concept of liberty that is at the heart of the Constitution.²²⁶ The aspect of *compulsion* is the basis for the determination of self-incrimination. Although mediation has not generally expanded into criminal cases, the potential danger exists in cases in which no criminal charges have been brought, but where self-incriminating information is solicited by mediators. If criminal acts are disclosed—in screening, orientation, or in the mediation itself—mediators are confronted with the contradictions between the promise of confidentiality and their role as state actors with obligations to report abuse and neglect of children, intent to harm oneself or another, planning a crime, etc.

From the initial contact with the mediator or mediation center, parties find that in order to proceed with mediation they are asked to disclose a great deal of personal information. Information sought from parties may include details of the incident(s), descriptions of their work and home lives and their relationships, drug or alcohol use, or occurrences of domestic violence,²²⁷

²²² John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1068–69 (1994).

²²³ See *id.* at 1070.

²²⁴ See *id.* at 1084–85.

²²⁵ See Note, *supra* note 155, at 946 (“Wigmore found the crucial element of fifth amendment protection to be the prohibition of compulsion exerted on the person of the defendant to produce assertive conduct or to ‘extract from the person’s own lips an admission of his guilt.’”) (citing WIGMORE, EVIDENCE § 2263 (3d. ed. 1940)).

²²⁶ Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 220 (1960) (“[T]he [Fifth Amendment] privilege is more than a series of technical rules governing a miscellany of exemptions from the ordinary duty to testify. It must be seen as a functioning member of the body of our liberties, arising truly out of the ‘higher law’ background which so thoroughly permeates our Constitution and its construction.”).

²²⁷ Intake forms used by some mediation providers ask parties to disclose large amounts of personal information regarding their own behavior and the behavior of others

some of which could be incriminating. Mediators guide the process by extracting information, seeking confessions,²²⁸ and reworking statements in the direction of settlement.²²⁹ Thus parties engage in a confessional ritual²³⁰ as they explain their view of the events. The compulsion to offer information calls into question whether parties' Fifth Amendment rights are protected when information is gathered for mediation,²³¹ as mediators inquire about parties' jobs, housing, and/or personal lives, without actually knowing how the information will be used. Confusion about the relationship of mediation to the law²³² and uncertainty about court oversight²³³ easily lends itself to the potential for coercion²³⁴ to enter into mediation and to reveal personal information²³⁵ that is potentially incriminating.

in the household, including a spouse or children. Samples from Mediation Centers on file with the author.

²²⁸ See Pavlich, *supra* note 20, at 722 ("So commonplace is confession nowadays that we do not even see it as a form of constraint, as an obligation, or even as a power. Rather, we seem fixated on telling all, pouring out the fables that might liberate ourselves from the gnawing suspicion that repressing secrets can lead to events too dark to contemplate.").

²²⁹ See *id.* at 723 ("[T]he mediators try to extract and fashion particular sorts of confessions by constantly probing for information, rephrasing issues, praising or castigating confessors—all of which are directed at dispute settlement.").

²³⁰ See *id.* at 722 ("[C]ommunity mediation can be included as a confessional site that constructs a 'ritual of discourse' requiring subjects to disclose the truth about themselves around a given set of circumstances.").

²³¹ Gary R. Clause, *The Constitutional Right to Withhold Private Information*, 77 NW. U. L. REV. 536, 543 (1982) ("Justice Stevens recognized that the government can infringe the interest in nondisclosure of personal information not just by disseminating private information to the public, but also by the process of gathering that information.").

²³² See Nolan-Haley, *supra* note 32, at 85 ("[C]ourt mediation without knowledge of law offers simply the illusion of justice. Unless bargaining is informed by knowledge of law, justice in court mediation is also a 'castle in the air.'").

²³³ See Meador, *supra* note 176, at 1806 ("The United States inherited the concept of a court's inherent authority over its process and procedure from the English courts. This inherent authority is well established and widely accepted in the state and federal judiciaries, although views differ as to the precise scope of such authority.").

²³⁴ See Weston, *supra* note 4, at 604 ("Because ADR use is largely unaccountable and the players unregulated, the potential to exploit bargaining power or abuse the process is ripe, with seemingly minimal consequences.").

²³⁵ See Pavlich, *supra* note 20, at 722 ("[C]ommunity mediation embraces a confessional ethos that pressures disputants as they refashion themselves in the quest to settle a dispute.").

During the orientation phase, mediators seek to make good on the promise to provide faster, cheaper, and better resolution than litigation—by bringing parties into mediation. Studies have found that coercion to participate in mediation is effective.²³⁶ Direct pressure by the court can be brought to bear on disputants to compel participation in mediation.²³⁷ Those who decide not to participate are often seen as adversarial.²³⁸ Where mediation programs are housed in the court, or mediations are conducted in courthouses, parties may be unable to distinguish between mediation and judicial processes.²³⁹ Many community mediation centers depend largely on the courts for cases as well as funding.²⁴⁰ Thus the pressure on mediation programs may translate into pressure on the parties²⁴¹ to reveal private information,²⁴² to enter mediation, to continue in mediation,²⁴³ and to reach

²³⁶ See Hedeon, *supra* note 35, at 276–77.

²³⁷ See *id.* at 277 (“[e]xplicit coercion may be used to persuade a reluctant disputant to agree to mediation by implying that prosecution will be initiated if mediation is not. Implicit coercion is evident in referrals by judges who agree to dismiss the court case if successful mediation takes place, and it appears in communications from prosecutors, police officers, and mediation program staff”) (quoting Janice A. Roehl & Royer F. Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. SOC. ISSUES 161, 172 (1985)).

²³⁸ See Silbey, *supra* note 183, at 352 (“The routine recourse to mediation creates a bias against those who do not participate, with the result that they are often negatively characterized and thus stigmatized as adversarial by those who rely on mediation to resolve a good share of the dispute caseload.”).

²³⁹ See Hedeon, *supra* note 35, at 277.

²⁴⁰ Timothy Hedeon & Patrick Coy, *Community Mediation: The Ties That Bind*, 17 MEDIATION Q., 351, 356 (2000) ([the study] “bears out our concerns regarding mediation’s dependence on the courts for funding. She found that funding agencies have a profound impact on the shape and approach of individual programs . . .”) (citing ALBIE DAVIS, *MEDIATION IN MASSACHUSETTS: A DECADE IN DEVELOPMENT, 1975 TO 1986*, at 35 (1986)).

²⁴¹ See *id.* at 356–57 (“[I]f mediation programs and their mediators are subject to bureaucratic pressures to keep cases moving through the docket by a written agreement, they will likely pass that pressure on to the parties seated around the mediation table: ‘Mediators remind recalcitrant disputants that if they don’t come to agreement, the court may hold it against them.’” (quoting J.E. BEER, *PEACEMAKING IN YOUR NEIGHBORHOOD: REFLECTIONS ON AN EXPERIMENT IN COMMUNITY MEDIATION*, at 212 (1986))).

²⁴² See Pavlich, *supra* note 20, at 723 (“[D]isputants are enticed to confide as fully as possible to delegated local authorities (the mediators).”).

²⁴³ See Hedeon, *supra* note 35, at 279.

settlement.²⁴⁴ Pressure can also come from a party's attorney, using mediation to provide a "reality check."²⁴⁵ The court's purpose in supporting mediation is clearly to produce settlements,²⁴⁶ which in turn puts the onus on mediators to produce high settlement rates.²⁴⁷ In private disputes, ADR processes are often mandated through business contracts with consumers or employees in which parties' unknowingly abandon remedies normally available in court.²⁴⁸ Parties with less power who engage in mediation with institutions or parties of greater power and resources are vulnerable to pressures to voluntarily relinquish private information²⁴⁹ and to compromise.²⁵⁰

Privacy law is meant to protect against abuses of power by government institutions. Mediation has become one of these institutions,²⁵¹ despite being characterized as a voluntary process in which it is the parties who have the power.²⁵² The mythology that the parties control the mediation²⁵³ belies its

²⁴⁴ See Fiss, *supra* note 29, at 1075 ("Consent is often coerced ... Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

²⁴⁵ See Thompson, *supra* note 31, at 533.

²⁴⁶ See *id.* at 516 ("Courts and legislatures ... have readily accepted mediation, not necessarily because of an interest in self-determination, but because cases settled with little effort or expense by the judicial system.").

²⁴⁷ See Nolan-Haley, *supra* note 32, at 98 ("[S]ettlement is too often the unitary goal of court mediation programs. Given the pressure techniques used by some court mediators and the high number of reported settlement rates...there are serious fairness concerns for the litigants ...").

²⁴⁸ See Hensler, *supra* note 49, at 184 ("[B]usinesses have enthusiastically embraced arbitration for disputes between them and *individual consumers* and between management and its *employees*...Today, an increasing number of consumer transactions and workplace disputes are governed by arbitration agreements that require consumers and workers to waive their rights to a legal remedy if a dispute arises as the result of the transaction.").

²⁴⁹ See Eberle, *supra* note 147, at 996 ("Each person requires a certain inviolable area of personal freedom, beyond unwarranted official inquiry or incursion, in which to think, formulate, and structure one's life freely.").

²⁵⁰ Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347, 354 (1990) ("Compromise is an equitable solution only between equals; between unequals, it 'inevitably produces inequality.'") (quoting J. AUERBACH, *JUSTICE WITHOUT LAW?*, at 136 (1986)).

²⁵¹ See Silbey, *supra* note 183, at 353 ("Th[e] mythology has been quite successful in generating support for the institutionalization of mediation and the establishment of both a market and an occupation in the practice of mediation.").

²⁵² See Hedeon & Coy, *supra* note 240, at 359.

function as an informal process that extends the reach of the court.²⁵⁴ Mediators, while appearing to be informal and autonomous,²⁵⁵ gather information under the rubric of “storytelling”²⁵⁶ (frequently characterized as “venting”).²⁵⁷ In the prefatory note to the Uniform Mediation Act, the authors clarify that while candor is encouraged in mediation,²⁵⁸ it is not “essentially a truth-seeking process in our justice system such as discovery.”²⁵⁹ It would follow then, that parties prior to and during mediation should know that they maintain the same right *not to disclose information*,²⁶⁰ as they would in court. Without understanding the right to withhold

²⁵³ See Silbey, *supra* note 183, at 351 (“A large body of empirical evidence exists which demonstrates that, despite claims to the contrary, the mediation process is routinized. It is not adapted by or responsive to individual parties, their particular characteristics, individual claims or situations.”).

²⁵⁴ See HARRINGTON, *supra* note 16, at 170 (“Informalism expands the capacity of the justice system to manage minor conflicts and legitimates the extension of state intervention on functionalist grounds.”).

²⁵⁵ See HOFRICHTER, *supra* note 19, at xiv (“[T]he informal systems are forms of law, not isolated spheres. They remain connected to the formal legal system and legal concepts. Both are part of the state and rely on each other, even though the informal state creates an appearance of autonomy.”).

²⁵⁶ Janet Rifkin, Jonathan Millen & Sara Cobb, *Toward A New Discourse for Mediation: A Critique of Neutrality*, 9 MEDIATION Q. 151, 161 (1991) (“[A]ll human communication can be understood as story, or narrative. *Narrative* refers to the way in which stories cohere together . . . what a successful mediator does is facilitate the production of a coherent narrative.”).

²⁵⁷ Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 DISP. RES. MAG. 15, 17 (1999) (“In mediation parties are . . . invited to present their side of the dispute. But anecdotal data suggest that many mediators view this process as ‘venting,’ rather than as an opportunity for parties to present facts that will shape an outcome.”).

²⁵⁸ U.M.A. Prefatory Note (2001), <http://www.law.upenn.edu/bll/archives/ulc/mediat/med501.htm> at 6 (“Candor during mediation is encouraged by maintaining the parties’ and mediators’ expectations regarding confidentiality of mediation communications.”) (last visited Mar. 19, 2012).

²⁵⁹ See *id.* at 10.

²⁶⁰ See Clause, *supra* note 231, at 542 (“Writing for a unanimous Court, Justice Stevens recognized the right of informational privacy in two short sentences. The right of privacy comprises ‘at least two different kinds of interests . . . the individual interest in avoiding disclosure of personal matters,’ while ‘another is the interest in independence in making certain kinds of decisions.’”).

information,²⁶¹ and the importance of considering the potential consequences of what they disclose,²⁶² participants in mediation may jeopardize their right not to incriminate themselves.²⁶³ In 1964 the Court, in *Murphy v. Waterfront Comm'n*, saw the right not to incriminate oneself as “our respect for the inviolability of the human personality and of the right of each individual ‘to a private enclave where he may lead a private life.’”²⁶⁴ It is sufficient for the purposes of assessing whether mediation is appropriate to simply ask if parties feel safe in negotiating directly with the other party. If an order of protection documenting an incident of violence exists between the parties, it normally serves as an indicator that mediation is not appropriate. In all other cases, mediators would assess parties’ sense of safety in the same way they must assess parties’ capacities²⁶⁵ to negotiate in good faith, to formulate proposals, and to make decisions in their own best interests, in order to determine if mediation is appropriate. Given the difficulties in predicting the legal limitations of confidentiality, it is imperative that mediators consider carefully what information they solicit.

The Fifth Amendment also offers protection by providing a guarantee of due process.²⁶⁶ In defining mediation as consensual, due process is generally

²⁶¹ See SOLOVE and ROTENBERG, *supra* note 170, at 2 (“Information privacy law is an interrelated web of tort law, federal and state constitutional law, federal and state statutory law, evidentiary privileges, property law, contract law, and criminal law . . . It is developing coherence as privacy doctrines in one area are being used to inform and structure privacy responses in other areas.”).

²⁶² See Eberle, *supra* note 147, at 974 (“In the information age, possession of information is power. Possession of personal information is the power to influence if not manipulate, human behavior . . . The more that is known about a person, the easier the person is to control.”).

²⁶³ See Clause, *supra* note 231, at 553 (“The Fifth Amendment’s privilege against self-incrimination also involves the right to withhold information. The Court has stated that ‘one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy.’”).

²⁶⁴ *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (quoting *United States v. Grunewald*, 233 F.2d 556, 581–82 (2d Cir. 1956) (Frank, J., dissenting)).

²⁶⁵ See Oberman, *supra* note 11, at 797 (“Parties must have the capacity to understand and carry out all the requirements of the mediation process in order to meet the definition of self-determination. Mediators must have the ability to explain these requirements and the awareness to know if parties are understanding them. Otherwise the parties will not be sufficiently informed to exercise self-determination regarding the decision whether or not to participate.”).

²⁶⁶ “[N]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”

considered inapplicable²⁶⁷ within the context of mediation.²⁶⁸ Mediation advocates make the assumption that parties wish to settle their disputes in conciliatory processes offering savings in costs and time. This assumption is not substantiated by research.²⁶⁹ Many disputants still prefer using the courts in order to seek public vindication,²⁷⁰ rather than informal dispute resolution. Studies claiming success based on participant satisfaction with mediation programs²⁷¹ fail to address the larger issues such as the use of mediation to prevent access to courts or concerns that mediation is not providing more just outcomes.²⁷² The search for justice that brings most petitioners into the court system is converted in mediation from a demand for rights, into an ostensibly collaborative conversation about needs.²⁷³ Addressing needs rather than rights shifts attention away from the available legal remedies that comprise due process. Instead, mediators guide parties towards settlement based on actions individuals may take to achieve reconciliation.²⁷⁴

²⁶⁷ Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187 ("At a minimum, the procedural due process jurisprudence raises doubts regarding the applicability of procedural due process to court-connected mediation and other processes defined as 'consensual.'").

²⁶⁸ See *id.* at 191 ("[U]sing the lens of procedural due process jurisprudence, mediation may be viewed as relieving the courts of the obligation to deliver *either* substantive *or* procedural justice.").

²⁶⁹ See Hensler, *supra* note 257, at 16 ("Empirical results suggesting that ADR may not save litigation costs or time have struck a sour note because they fly in the face of data indicating that lawyers and parties *think* ADR is producing such savings. The discrepancy between subjective and objective data gives empiricists pause.").

²⁷⁰ See Hensler, *supra* note 204.

²⁷¹ Deborah Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 77 ("As the ADR movement has grown, an increasing number of non-profit organizations and individual scholars have become committed to its continuation. It is not surprising that these organizations and individuals would prefer to celebrate ADR's successes, rather than investigate its limitations, to focus on positive outcomes rather than ponder null or negative results.").

²⁷² See Hensler, *supra* note 49, at 188 ("We know virtually nothing about the outcomes of mediation programs, about whether they change the distribution of power between the 'haves' and 'have nots.' We have no idea whether mediation helps to open the courts to disputants of lesser means or those with 'less important' claims . . .").

²⁷³ See Silbey, *supra* note 13, at 177 ("The mediation ideologues promised a magical process that would satisfy fundamental human needs by making participants more self aware, competent and happy.").

²⁷⁴ See Cobb, *supra* note 23, at 412.

CONFIDENTIALITY IN MEDIATION

Mediation often looks like other court processes such as settlement conferences.²⁷⁵ Mediation differs from court processes in the lack of oversight by the court²⁷⁶ of procedural²⁷⁷ and substantive fairness.²⁷⁸ In addition to concerns about fairness in the process, parties cannot evaluate fairness of proposals²⁷⁹ without adequate legal information.²⁸⁰ While mediation ideology²⁸¹ champions the notion that parties benefit from seeing disputes as problems to be solved,²⁸² research has shown that many disputants want to engage in procedures based on facts and law.²⁸³ Therefore, concerns about the right to due process are raised by pressures

²⁷⁵ See Welsh, *supra* note 267, at 192 ("In the courts studied, mediation most resembled traditional judicial settlement conferences, with a privately selected and privately paid mediator substituting for a publicly paid and publicly selected judge.").

²⁷⁶ See Weston, *supra* note 7, at 34–35 ("The question posed here is whether, and to what extent, the judicial power to monitor, regulate and sanction participants extends to court-connected ADR processes, in particular mediation, where the legislature has accorded a broad confidentiality privilege.").

²⁷⁷ See *id.* at 64 ("Confidentiality statutes can conflict with a court's authority to enforce its own procedural rules and orders mandating specific conduct or good faith participation in the court-connected ADR setting.").

²⁷⁸ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1560 (1991) ("The informal law of the mediation setting requires that discussion of principles, blame, and rights, as these terms are used in the adversarial context, be deemphasized or avoided . . . mediators typically suggest that the parties 'eschew[] the language of individual rights in favor of the language of interdependent relationships.' They orient the parties toward reasonableness and compromise, rather than moral vindication.").

²⁷⁹ See Maute, *supra* note 250, at 349 ("Theoretically, mediator accountability is satisfied by ensuring a procedurally fair process that treats parties with dignity and respect and stops intimidating or abusive behavior. Substantively, absent abuse of the mediation process, any settlement agreed to by the parties is deemed fair.").

²⁸⁰ See *id.* at 367.

²⁸¹ Susan Silbey, *Ideology, Power and Justice*, IN JUSTICE IN POWER IN LAW AND SOCIETY RESEARCH, 272, 272 (Bryant Garth & Austin Sarat eds., 1998) ("[T]he term 'ideology' generally points to the ability of ideas to affect social circumstances. Thus sociologists have sometime described the function of ideology as the capacity to advance the political and economic interests of groups or classes . . .").

²⁸² See Hensler, *supra* note 257, at 15 ("ADR practitioners—particularly mediators—have long emphasized the qualitative benefits of substituting problem-solving processes for adjudication.").

²⁸³ See Hensler, *supra* note 25, at 95 ("Sally Merry and Susan Silbey's research on why Americans take disputes to court . . . suggest[s] that at least through the mid-1980s litigants expected legal disputes to be resolved on the basis of public norms—that is what they thought 'justice' was about.").

brought to bear on parties to produce information that may jeopardize their right not to incriminate themselves, and by pressure to settle disputes out of court. Promotion of mediation as private²⁸⁴ and as an alternative to litigation²⁸⁵ obscures the reality that in court-referred cases at the least, mediators are state actors²⁸⁶ and parties continue to have a right to due process.

3. *Fourteenth Amendment*

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment carries a complex and controversial history, beginning with the intention to guarantee citizenship to all persons born in the United States,²⁸⁷ particularly former slaves. The *Dred Scott* decision in 1857²⁸⁸ deemed slaves incapable of being citizens.²⁸⁹ Without listing specific

²⁸⁴ See Reuben, *supra* note 15, at 594 (“An understanding of the basic routes by which a disputant may find himself or herself in an ADR hearing begins to demonstrate how the government plays a central, indispensable, and inseparable role in the seemingly private ADR system.”).

²⁸⁵ See Silbey *supra* note 13 at 174 (“[R]ather than competition for courts and the legal profession, it is more appropriate to see mediation as an addition to, rather than displacement of, traditional legal services.”).

²⁸⁶ See Reuben, *supra* note 15, at 608 (“The dissipation of ADR euphoria should permit judges and other legal policy makers and practitioners to more soberly understand, evaluate, and implement ADR. One reality that should become quickly apparent is that modern ADR is often driven by state action.”).

²⁸⁷ The controversy continues in the present day as Republicans question the Fourteenth Amendment’s granting of citizenship to all children born in the U.S. Rep. Luis Gutierrez, *Why We Should Welcome McConnell’s Demand for Hearings on Rescinding 14th Amendment*, August 4, 2010, http://www.huffingtonpost.com/rep-luis-gutierrez/mcconnell-is-right-to-dem_b_670899.html.

²⁸⁸ *Dred Scott v Sandford*, 60 U.S. 393 (1857). See WEST’S ENCYCLOPEDIA OF AMERICAN LAW at 280 (1998) (“[T]he U.S. Supreme Court placed its stamp of approval on the institution of slavery, holding that slaves were not ‘citizens’ within the meaning of the Constitution, but only ‘property’ lacking any constitutional protection whatsoever.”).

rights, the passage of the Fourteenth Amendment in 1868 laid a foundation for equal citizenship.²⁹⁰ Unfortunately, for the following eighty years the ideal of equal citizenship was abandoned in decisions handed down by the Court, such as *Plessy v. Ferguson* in 1896,²⁹¹ establishing the separate but equal doctrine.²⁹² Equal protection was not instituted until *Brown v. Board of Education* in 1954.²⁹³ The Court holds as suspect laws that classify and stigmatize some persons based on traits that are “immutable and highly visible—such as race or sex.”²⁹⁴ The Court found three sets of interests as “fundamental”: 1) voting rights, 2) access to the courts, and 3) rights regarding marriage, procreation and family relations.²⁹⁵ While the Fourteenth Amendment does not grant total immunity from state intrusion in these matters, it sets a high standard for denial of protection.²⁹⁶ The claim for equality under the Fourteenth Amendment is the claim to be treated the same as other members of a specific group who share the attributes at issue.²⁹⁷ The Fourteenth Amendment expansion of the constitutional guarantee of equality increased federal government power in relation to both the states and private institutions,²⁹⁸ through the doctrine of state action. State action as defined by the Fourteenth Amendment includes discriminatory acts committed by government officials or agents or private persons “cloaked with some measure of state authority.”²⁹⁹ According to this definition, mediation is state action, referring at the very least, to court certified mediators and court-referred mediation cases.

In 1965 the Court “exploded the world of individual liberties wide open”³⁰⁰ in its decision in *Griswold v. Connecticut*, finding that married

²⁸⁹ See ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION at 641 (Leonard W. Levy, Kenneth L. Karst, & Dennis J. Mahoney, eds., 1986).

²⁹⁰ See *id.* at 642.

²⁹¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896). See WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 288, at 281 (“The Supreme Court placed its imprimatur on . . . forms of racial apartheid in the landmark decision *Plessy v. Ferguson*.”).

²⁹² See *id.* (“Following *Plessy*, the ‘SEPARATE-BUT-EQUAL’ doctrine remained the lodestar of Fourteenth Amendment jurisprudence for over half a century.”).

²⁹³ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁹⁴ See ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 289, at 644.

²⁹⁵ See *id.* at 644.

²⁹⁶ See *id.*

²⁹⁷ See *id.* at 646.

²⁹⁸ See *id.*

²⁹⁹ See WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 288, at 288.

³⁰⁰ See Gormley, *supra* note 69, at 1391.

couples using contraception had a right to privacy, to be free from intrusion of the state into the home/bedroom.³⁰¹ After *Griswold* the Court extended the right not to be intruded upon in the home or in the association of marriage, to the right of “liberty of choice”³⁰² in *Roe v. Wade*.³⁰³ Choices regarding marriage, procreation, and individual liberty encompass both substantive³⁰⁴ and procedural rights.³⁰⁵ The rulings in *Griswold* and *Roe*, clarified the court’s role in preventing the state from overstepping the boundaries of the social contract.³⁰⁶ Two kinds of decisions were seen as fundamental decision privacy. One was in decisions about whom to marry, how to educate one’s children and how to define one’s family; the second kind refers to the social contract³⁰⁷—attempting to establish which decisions are personal and private³⁰⁸—and which belong to the state.³⁰⁹ As the law evolved, personal relationships—not only in marriage—came to be seen as a protected privacy right.³¹⁰ In the context of the Fourteenth Amendment, decisions made in mediation about family life and individual autonomy, embody these constitutional rights. The process of mediation offers a concrete opportunity to exercise them.

³⁰¹ See *id.* at 1392.

³⁰² See *id.* at 1396.

³⁰³ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁰⁴ See *Baker*, *supra* note 50.

³⁰⁵ See *Gormley*, *supra* note 69, at 1397.

³⁰⁶ See *id.* at 1413.

³⁰⁷ See *id.* at 1410 n.353 (citing JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (B.B. Macpherson, ed. 1980) (“The person who gives ‘express consent’ to enter into a society becomes a ‘perfect member of that society, a subject of that government.’”).

³⁰⁸ See *Rubinfeld*, *supra* note 172, at 770 (“But what is this ‘private life’ to which personhood now adverts? It is, of course, the field of sexuality: marriage, contraception, childbearing, and so on. Personhood finally comes to rest its case on the fundamental importance of sexuality . . .”).

³⁰⁹ See *id.* at 805 (“The right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.”).

³¹⁰ See *id.* at 784 (“There are perhaps no legal proscriptions with more profound, more extensive, or more persistent affirmative effects on individual lives than the laws struck down as violations of the right to privacy. Anti-abortion laws, anti-miscegenation laws, and compulsory education laws all involve the forcing of lives into well-defined and highly confined institutional layers... They affirmatively and very substantially shape a person’s life; they direct a life’s development along a particular avenue. These laws do not simply proscribe one act or remove one liberty, they inform the totality of a person’s life.”).

The Fourteenth Amendment protection of fundamental rights³¹¹ has come to include personal liberties guaranteed in the Bill of Rights³¹² such as freedom of speech, religion, assembly, right to counsel, right to be protected against unreasonable search and seizure, the right not to incriminate oneself, the right to a jury trial, and the right to be free from cruel and unusual punishment.³¹³ Through the doctrine of incorporation,³¹⁴ the fundamental rights³¹⁵ emanating from the first eight amendments³¹⁶ are "made applicable"³¹⁷ to the states by the Fourteenth Amendment, in the due process clause.³¹⁸ States are required to uphold equal protection³¹⁹ of "life, liberty or property." While there is a symbiotic relationship between liberty and privacy, they are not the same. Privacy is security from coercion or invasion,

³¹¹ Felix Frankfurter, *Memorandum on Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 749 (1965) ("[T]he Fourteenth encompasses only 'fundamental' rights . . .").

³¹² Thomas I. Emerson, *Nine Justices In Search of A Doctrine*, 64 MICH. L. REV. 219, 228 (1965) (citing Mr. Justice Douglas in *Griswold* ("Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.")).

³¹³ See WEST'S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 288, at 287.

³¹⁴ Norman Redlich, *Are There Certain Rights . . . Retained By The People?* 37 N.Y.U. L. REV. 787, 800 (1962) ("[The basic] 'incorporation' theory of Justice Black or the 'absorption' approach of Justice Brennan is the assumption that the Fourteenth Amendment, either by original intention in 1868 or by subsequent interpretation, includes certain rights which, prior to 1868, were available to Americans only as a protection from intrusion by the federal government.").

³¹⁵ See Emerson, *supra* note 312, at 229 ("The right of privacy can be considered such a fundamental right and hence protected under the due process clause.").

³¹⁶ Robert B. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 264 (1965) ("It has long been accepted constitutional doctrine . . . that at least 'some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.'").

³¹⁷ See Frankfurter, *supra* note 311, at 748 ("On the basis of the judicial development, case by case, the use of the phrase 'made applicable' represents a shorthand for an intellectual process that has been worked through and need not be repeated at length.").

³¹⁸ See Redlich, *supra* note 314, at 799 ("As Justice Douglas demonstrated in his dissent in *Poe v. Ullman*, . . . it is possible to interpret the due process clause of the Fourteenth Amendment to include rights in addition to those specified in the first eight amendments.").

³¹⁹ See WEST'S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 288, at 287.

while liberty is the freedom to make personal choices:³²⁰ i.e. freedom of religion protects the right to choose one's own belief system, while privacy allows us to keep those beliefs to ourselves.³²¹ In mediation, both freedom and privacy may be at stake as parties sort out what personal information is relevant to disclose, what they may withhold during negotiations about significant life choices about where they live or work, or when they see their children.³²²

The protection of private relationships in the Fourteenth Amendment gives additional weight to the physician–patient, priest–penitent, and attorney–client privilege.³²³ Confidential relationships³²⁴ presume a trust placed by an individual in an agent who has agreed to put this individual's interest above their own.³²⁵ This privilege has been granted in most states to mediators and parties in mediation.³²⁶ A privilege that grants mediators immunity from testifying is seen by some as critical to maintaining neutrality.³²⁷ However, in other privileged relationships, the duty of

³²⁰ See Gross, *supra* note 92, at 44 (“[A] source of confusion is perhaps avoided if we speak of security as ‘freedom from,’ distinguishing it from ‘freedom to’ . . . both notions seem to have been subsumed in the parlance of constitutional law under the term ‘liberty’”).

³²¹ Thomas H. O'Connor, *The Right To Privacy in Historical Perspective*, 53 MASS. L.Q. 101, 102 (1968).

³²² See Baker, *supra* note 50, at 1163 (“[T]he ‘right of selective disclosure,’ is concerned with the ability of ‘individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.’”).

³²³ See *id.* at 1178 (quoting Justice Douglas) (“The right of privacy has no more conspicuous place than in the physician patient relationship, unless it be in the priest-penitent relation.”).

³²⁴ See Gavison, *supra* note 169, at 436 (“The concern here is the existence of relationships in which confidentiality should be protected, so that parties know that confidences shared in these relationships will not be forced out.”).

³²⁵ See Hughes, *supra* note 10, at 57 (“A confidential relationship arises when an individual justifiably places his or her trust in an agent, expecting the agent to place the principal's interest above his or her own, and the agent accepts the responsibility . . . For many professions, the duty of confidentiality is imposed upon members of the respective professions by codes of ethics or by statutes.”).

³²⁶ See *supra* note 36.

³²⁷ Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 445–46 (1984) (“[P]rotection of the mediator's status as a neutral demands recognition of a distinct privilege on his part not to testify. This privilege must be assertable by the mediator when necessary to protect his interest in neutrality or on the motion of a party, when necessary to protect party expectations.”).

CONFIDENTIALITY IN MEDIATION

confidentiality applies only to the professional, not the client.³²⁸ A mediation privilege applies not only to communications between the mediator and client, but among all the parties in mediation.³²⁹ Unlike evidentiary exclusions, a mediator privilege is not tied to the purpose of the disclosure.³³⁰ Statutes vary regarding who holds the privilege: the mediator, the parties, or the mediation process itself.³³¹ Without understanding who holds the privilege, it is difficult to determine who can waive it.³³² Thus it remains unclear whether the mediator may still invoke the privilege, even if the parties to the mediation have waived confidentiality.³³³

As mediators work with parties to navigate the territory between rights and needs, between privacy and the social good, and between confidentiality and the rules of evidence, the question may be posed: is mediation a site of due process protection under the Fourteenth Amendment?³³⁴ Are parties releasing the court from its obligation to provide procedural justice by consenting to mediation?³³⁵ This question has been addressed by the Task Force on Alternative Dispute Resolution in Employment in creating a due

³²⁸ See Hughes, *supra* note 10, at 33.

³²⁹ See *id.* at 30.

³³⁰ See Rosenberg, *supra* note 1, at 165 (“[T]he protection from the mediator privilege applies regardless of the purpose for disclosing, while the evidentiary exclusion makes evidence inadmissible only when offered to prove the validity or amount of the claim.”).

³³¹ See *id.* at 159 (“[S]tates that provide for a mediator privilege differ on whether the privilege runs with the mediator, the parties, or the proceedings themselves.”).

³³² See *id.* (“[I]t is the privilege holder who may assert or waive the privilege.”).

³³³ See Perino, *supra* note 4, at 9 (“Unlike some other privileges, such as the attorney-client privilege, the nature and purpose of a mediation privilege requires that the mediator be permitted to invoke a privilege in at least some situations where all the parties to the mediation have waived confidentiality.”).

³³⁴ See Welsh, *supra* note 267, at 180 (“[P]rocedural due process jurisprudence indicates that the courts’ appreciation of procedural justice is unlikely to translate easily to processes in which the disputants, not the courts, are deemed to exercise control over outcomes.”).

³³⁵ See *id.* at 191 (“Indeed, using the lens of procedural due process jurisprudence, mediation may be viewed as relieving the courts of the obligation to deliver *either* substantive *or* procedural justice. When the disputants in civil actions reach their own settlements through mediation, they relieve the courts from the obligation to reach decisions that meet a standard of substantive justice.”).

process protocol for employment disputes,³³⁶ to support parties' rights to due process in mediation and arbitration. The need to establish this protocol makes clear that fairness in mediation is not the equivalent of the Fourteenth Amendment protection of due process—the ethic of fairness rarely addresses the inequalities between parties in the larger social context.³³⁷ While assurances are routinely given by mediators that neutrality³³⁸ and fairness of the mediator are to be expected,³³⁹ these claims are not supported by research findings.³⁴⁰ In naming mediation centers “community justice centers,”³⁴¹ mediation advocates obscured the potential use of mediation to sacrifice equality before the law to another set of priorities³⁴² mandated by the court

³³⁶ A Due Process Protocol for Mediation and Arbitration of Statutory Disputes, http://www.ilr.cornell.edu/alliance/resources/Guide/Due_process_protocol_empdispute.html (last visited Feb. 16, 2012).

³³⁷ See Grillo, *supra* note 278, at 1569 (“Equating fairness in mediation with formal equality results in, at most, a crabbed and distorted fairness on a microlevel; it considers only the mediation context itself. There is no room in such an approach for a discussion of the fairness of institutionalized societal inequality.”).

³³⁸ Sara Cobb & Janet Rifkin, *Neutrality As A Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, 11 STUD. IN LAW, POL. AND SOC’Y 69, 70 (1991) (“The lack of clarity in the ethical standards of the professional organizations is reflected in the absence of any specific guidelines for the practice of neutrality; instead, local and tacit understandings about neutrality (based on the psychologized vocabulary) guide practice.”).

³³⁹ See Craig A. McEwen, Nancy H. Rogers, & Richard J. Maiman, *Bring In The Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1327 (1995) (“[C]ommentators differ sharply about whether there exist standards for evaluating the fairness of outcomes. For some mediation advocates, fair outcomes are in the eyes of the beholder—if parties believe the outcome to be fair, then it is.”).

³⁴⁰ Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, WIS. L. REV. 1359, 1400 (1985) (“Our review of social science writings on prejudice reveals that the rules and structures of formal justice tend to suppress bias, whereas informality tends to increase it.”).

³⁴¹ See HOFRICHTER, *supra* note 19, at xiv (“NDR [Neighborhood Dispute Resolution] falsely affirms the neighborhood as the basis of justice in the community ... —[I]t presents an idea of community and collective self-help that is contrived, uses community culture against itself as a form of regulation and, by its presence, distracts attention from broader community issues.”).

³⁴² See Delgado et al., *supra* note 340, at 1404 (“The ideal of equality before the law is too insistent a value to be compromised in the name of more mundane advantages.”).

for speed, economy, and flexibility,³⁴³ in which fairness of outcomes and the right to due process may be jeopardized.

3. *First Amendment*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³⁴⁴

Protection of privacy in mediation through the Fourth, Fifth, and Fourteenth Amendments creates a conflict with the First Amendment right to free speech. The First Amendment grants not only the right to speak, but also freedom of the press, the right to receive information and communication, and the right to know.³⁴⁵ The court's authority to override a confidentiality privilege³⁴⁶ rests on the right of the public to hear every man's evidence.³⁴⁷ But there are also aspects of the First Amendment that grant privacy: in the home from unwanted solicitations and in public places from being an unwilling observer or listener, where one is a "captive audience."³⁴⁸ First Amendment privacy combines the principles of protection from the state, and protection from other members of the community. The notion of privacy

³⁴³ See Della Noce, *supra* note 14, at 548 ("Where improved case management efficiency was promised in order to gain (or keep) political and financial support for court-connected mediation programs, pressures naturally came to bear to demonstrate that those efficiencies were being achieved.").

³⁴⁴ U.S. CONST. amend. 1.

³⁴⁵ Thomas I. Emerson, *Legal Foundations of the Right to Know*, [1976] WASH. U. L.Q. 1, 2 (1976) ("It is clear at the outset that the right to know fits readily into the First Amendment and the whole system of freedom of expression. ... First the right to read, to listen, to see, and to otherwise receive communications, and second the right to obtain information as a basis for transmitting ideas or facts to others.").

³⁴⁶ See Perino, *supra* note 4, at 9 ("[M]atters of convenience do not outweigh the important public policy in favor of requiring those with relevant evidence to testify or to be subject to discovery."). See also *id.* at 12 ("[W]hile confidentiality is important, it is not absolute. Like all privileges, a mediation privilege is an exception to the principle that the public is entitled to 'every man's evidence.'").

³⁴⁷ JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, 4 § 2192 at 2966 (1905) (citing the Duke of Argyll speaking in 1742 to the *Bill for Indemnifying Evidence* ("[T]he public has a claim to 'every man's evidence,' and that no man can plead exemption from this duty to his country.")).

³⁴⁸ See Gormley, *supra* note 69, at 1379.

under the first Amendment is not only freedom of speech, but freedom of thought, as voiced by Justice Marshall in *Stanley v. Georgia*:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.³⁴⁹

Yet in court-referred mediation, parties in essence become the captive audiences of mediation providers who are sanctioned by the court to offer mediation services.³⁵⁰ Mediators make assurances that privacy will be maintained, at the same time parties may be required to attend group orientation sessions, often held in the courthouse.³⁵¹ As state actors,³⁵² mediators have the power: 1) to gain access to petitions filed with the court; 2) to contact parties to discuss the details of the petition; 3) to determine whether parties have the capacity of self-determination and demonstrate a good faith intention to participate in mediation; and 4) to decide if mediation is appropriate. Whether in courthouse mediation orientation sessions, or by phone or mail, parties are urged to consider mediation rather than litigation.³⁵³ The initial purpose in filing a petition so that a judge will hear one's case,³⁵⁴ is transformed³⁵⁵ into a maze of informal quasi-legal

³⁴⁹ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

³⁵⁰ See Phillips, *supra* note 34, at 2 (describing, as an example of state regulation of mediation, the training requirements for state-employed mediators in North Carolina).

³⁵¹ See *id.* ("Litigants not meeting the criteria to be exempted are mandated to: 1) attend a group mediation orientation . . .").

³⁵² Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, 24 OHIO ST. J. ON DISP. RESOL. 549–50 (2009) ("Mediators in court-connected mediations strengthen their position power through their linkage with the court and its aura of authority.").

³⁵³ See Hedeon, *supra* note 35.

³⁵⁴ See Hensler, *supra* note 25, at 196 ("With little experience of public adjudication and little information available about the process or outcomes of dispute resolution, citizens' abilities to use the justice system effectively to achieve social change will diminish markedly.").

³⁵⁵ See HARRINGTON, *supra* note 16, at 35 ("State authority is not withdrawing from dispute resolution in periods of informal reform, it is being transformed. . . . Forms of therapeutic intervention in conflict resolution often blurs the State's role in *organizing* these forums for building consensus and in *defining* what conflicts they will hear.").

processes³⁵⁶ with which one is expected to comply, prior to a hearing in front of a judge. Filing petitions for custody³⁵⁷ or visitation may result in referral to orientation for mediation in addition to a parenting class (which in many states is mandatory),³⁵⁸ and court appointment of a Guardian *ad litem*.³⁵⁹

The doctrine of *parens patriae*,³⁶⁰ giving the state power to decide what is best for children, is invoked when petitions are filed for custody, or visitation, or both.³⁶¹ Use of the courts to socialize and stabilize families is nothing new.³⁶² During the period of reform in the early twentieth century, juvenile and family courts were seen as a mechanism for integrating

³⁵⁶ See *id.* at 15 (“The construction of informal ideology is linked to the reconstruction of judicial power and authority . . . Like legal formalism, the legitimacy of delegatization reforms is still grounded in procedure, but, in contrast to formalism, these procedures are characterized as ‘informal alternatives.’”).

³⁵⁷ KENNETH KIPNIS, *KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* 3–4 (Diana Lietjens Myers et al. eds., 1993) (“The view that children are under the sovereignty of their parents has largely given way to a different account, one we can call *custody*. The term suggests an entrusting of the child to the care of its parents. Custody acknowledges the truism that it take three to make a marriage: a man, a woman and a state. . . .parental authority is a stewardship, a *special permission* that the state bestows and can revoke if its conditions are not met.”).

³⁵⁸ Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375, 375 (April 2008) (“At this point in the evolution of family services and interventions . . . there are parent education programs in forty-six states throughout the United States. Some of these program mandate attendance by state statute (twenty-seven states), and others have county-wide or district-based mandates (five states), and some states have judicial rules and orders (six states)., Some statutes mandate all parents to attend (fifteen states), while others leave it within the discretion of the judge (fourteen states.)”).

³⁵⁹ BALLENTINE’S LAW DICTIONARY 540 (3d. ed. 1969) (defining guardian *ad litem* as: “A person appointed by the court during the course of litigation, in which an infant or a person mentally incompetent is a party, to represent and protect the interests of the infant or incompetent.”).

³⁶⁰ See *id.* at 911 (defining *parens patriae* as: “The doctrine that all orphans, dependent children and incompetent persons, are within the special protection, and under the control, of the state.”).

³⁶¹ Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. C. L. REV. 253 (1971) (“[I]n the first half of the nineteenth century, the chancery phrase *parens patriae* came to be used to justify the state in sundering children from parents. . . .a lineal descendent of poor law mechanisms for parting pauper children and their parents and placing the children out as apprentices.”).

³⁶² See HARRINGTON, *supra* note 16, at 20 (The campaign to ‘Americanize’ the immigrant, rehabilitate the delinquent, the deviant, and the discontent are examples of programs for the socialization of law . . .”).

immigrants and the lower classes into American life.³⁶³ In the 1970's and 1980's, with the emergence of court sanctioned ADR processes,³⁶⁴ the emphasis in court and legislative policies to address parties' rights was replaced by a focus on crisis management³⁶⁵ and settlement.³⁶⁶ As a result of policies promoting ADR, mediators, evaluators,³⁶⁷ and parent educators³⁶⁸ have gained considerable influence³⁶⁹ in reinforcing the state's power³⁷⁰ to define family norms.³⁷¹ With zeal reminiscent of the nineteenth century

³⁶³ See Schlossman, *supra* note 123, at 58 ("The juvenile court flunked parents just as the public school flunked children; in both instances the lower-class immigrant was the principal victim.").

³⁶⁴ See HARRINGTON, *supra* note 16, at 75 ("The ABA Conference on Popular Dissatisfaction with the Administration of Justice (1976) launched a national campaign to experiment with mediation and arbitration. Following the recommendations of this conference (The Pound Conference), the U.S. Department of Justice created the Office for Improvements to the Administration of Justice (OIA) ... One of OIA's main responsibilities was to promote national attention and provide leadership for the development of informal minor dispute processes.").

³⁶⁵ See HOFRICHTER, *supra* note 19, at xiii ("[Neighborhood Dispute Resolution]. . . is an institution of social crisis management rather than justice.").

³⁶⁶ See HARRINGTON, *supra* note 16, at 74.

³⁶⁷ See Bradshaw & Hinds, *supra* note 127, at 318 ("[E]valuators are usually counselors . . . expected to preserve neutrality in the custody dispute. However, the nature of the information required for the report (e.g. a description of relationships among the child and the family and other significant people) . . . will be strongly influenced by perceptions of 'appropriate' behaviors.").

³⁶⁸ See Pollet & Lombreglia, *supra* note 358, at 379 ("[M]andating parent education for all parents going through separation or divorce is a 'major social policy step' for the courts.").

³⁶⁹ MURRAY EDELMAN, *POLITICAL LANGUAGE WORDS THAT SUCCEED AND POLICIES THAT FAIL* at 75 (1977) ("The helping professions are the most effective contemporary agents of social conformity and isolation. In playing this political role they undergird the entire political structure, yet they are largely spared from self-criticism, from political criticism, and even from public observation.").

³⁷⁰ See George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?* 25 DEPAUL L. REV. 895, 901-02 (1976) ("The concept of *parens patriae* . . . evolved from theory to doctrine. The state could invade the home, replace the parents, and take custody of the child.").

³⁷¹ See Rubenfeld, *supra* note 172, at 776 ("Foucault identifies a *normalizing* function exercised throughout the political and social apparatus, working to mold our identities into patterns designated as healthy, sane, law-abiding, or otherwise normal.").

reformers who set standards of acceptable parenting,³⁷² new standards now define and measure collaborative and healthy parenting relationships.³⁷³ Parent education programs are endorsed as positively influencing parenting behavior.³⁷⁴ Mechanisms such as mediation³⁷⁵ and parent education thus create a rhetoric³⁷⁶ that places blame on individuals³⁷⁷ rather than addressing the social and political conditions at the root of the conflict,³⁷⁸ such as poverty.³⁷⁹ Poverty usually results in a lack of decent housing, lack of

³⁷² Rendleman, *supra* note 361, at 253 (“Poverty, the use of alcohol, and ‘immoral’ behavior were all reference points which the controlling groups in the nineteenth century selected to define others as abnormal and themselves as normal. The remedy was to inculcate conventional mores by parting the malleable children from their unregenerate parents and raising the children by dominant standards.”).

³⁷³ Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 732 (1988) (“[D]ivorce is now described as a process that, through mediation, restructures and reformulates the spouses’ relationship, conferring equal or shared parental rights on both parents although one, in practice, usually assumes the primary responsibility”).

³⁷⁴ See Pollet & Lombreglia, *supra* note 358, at 377 (“It is believed that ‘interventions, such as parent education, can have a positive influence on the adjustment of children if such programs can increase parental sensitivity to their children’s needs, reduce conflicts and promote more cooperative approaches to parenting.’”).

³⁷⁵ See MASON, *supra* note 120, at 236–37 (“Most of the feminist critics assert that the adversarial court process, warts and all, provides more protection and support for women than does mediation. Even granting the patriarchal nature of the legal process and the almost unlimited discretion afforded individual judges, these critics maintain that the presence of lawyers serves women’s rights, and that the authority of rules and precedent, neutrally conceived, provides a more empowering alternative for the powerless.”).

³⁷⁶ See Fineman, *supra* note 373, at 730 (“The professional language of the social workers and mediators has progressed to become the public, then the political, then the dominant rhetoric. It now defines the terms of contemporary discussions about custody and effectively excludes or minimizes contrary ideologies and concepts.”).

³⁷⁷ See ABEL, *supra* note 17, at 7 (“It is just because individuation is the primary function of informal institutions that they can accomplish their purpose ... Informal institutions produce this result by treating all conflict as individually caused and amenable to individual solution.”).

³⁷⁸ See HOFRICHTER *supra* note 19, at xxvi (“This interpersonal view of disputes ignores the ways in which individuals may benefit qua individuals but lose as members of a larger social class whose interests cannot be fully satisfied through law or private case-by-case resolution of personal grievances because the issues involve questions of political power that extend beyond legality.”).

³⁷⁹ See EDELMAN, *supra* note 369, at 71 (“[C]ommon is the view that the poor require treatment and control whether or not they display any pathological symptoms.”).

medical care, and work demands that do not allow parents much time to spend with their children.³⁸⁰ Guardians *ad litem*, evaluators, and social workers make recommendations to the court regarding custody and visitation based on “the best interest of the child” standard.³⁸¹ These professionals who carry out the state’s agenda,³⁸² base their recommendations on a parent’s willingness to comply with court standards.³⁸³ Although charged with representing the best interests of the child,³⁸⁴ Guardians *ad litem* may have spent little time with families before making a determination regarding the quality of the parent–child relationship.³⁸⁵ Mediators and parent educators also represent a court-sanctioned ideology³⁸⁶ in favor of joint custody.³⁸⁷

Though this belief is manifestly political and class based, the language social workers use to justify surveillance and regulation of the poor is psychological in character.”).

³⁸⁰ David F. Lebarée, *Parens Patriae: The Private Roots of Public Policy Toward Children*, 26 HIST. EDUC. Q. 113 (Spring 1986) (“American ideology puts an unreasonable burden on the family and then has the agents of the state grudgingly step in when the family fails to deal with this burden, all the time grumbling about parental responsibility.”).

³⁸¹ Margaret Martin Barry, *The District of Columbia’s Joint Custody Presumption: Misplace Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 769 (1997) (“From the beginning, courts have viewed their role with regard to child custody determinations as one of *parens patriae*—a duty to protect vulnerable citizens. Consistent with that role, the best interest of the child has been the driving standard, and, as such, statutory presumptions have been stated in those terms.”).

³⁸² See Fineman, *supra* note 373, at 742 (“The ‘best interest of the child’ standard without the legal presumption of maternal custody, as well as the emergence of concepts like the ‘psychological parent,’ mandated the involvement of mental health professionals in custody decisionmaking.”).

³⁸³ See Rubinfeld, *supra* note 172, at 784 (“The danger, then, is a particular kind of creeping totalitarianism, and unarmed *occupation* of individuals lives. That is the danger ... a society standardized and normalized, in which lives are too substantially or too rigidly directed. That is the threat posed by state power in our century.”).

³⁸⁴ Joan B. Kelly, *The Best Interest of the Child A Concept in Search of Meaning*, 35 FAM. & CONCILIATION CTS. REV. 377, 378 (1997) (“Discussions and declaration of children’s best interests are often vague, circular, and laden with psychological concepts and clichés that themselves lack definition and consensus.”).

³⁸⁵ See GRUBB & LAZERSON, *supra* note 126, at 44 (“Americans lack any sense of ‘public love’ for children, which would parallel parental love; therefore public institutions are more concerned with children as instruments to achieve other social goals efficiently—high growth rates, lower welfare costs, social peace—than with children’s well-being.”).

³⁸⁶ Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?* 3 CAN. J. WOMEN & L. 134, 139 (1989) (“When there is a hegemonic ideology, shared by the legal system, other institutions, and citizens, there is little need

CONFIDENTIALITY IN MEDIATION

Under the presumption of joint custody,³⁸⁸ parents are assessed based on their ability to separate the couple relationship from the parenting relationship,³⁸⁹ and the intention of each parent to maintain a “friendly” relationship with the other parent.³⁹⁰ Mediators, as well as parent educators, social workers, Guardians *ad litem* and evaluators are likely to impose standards on families that may be undesirable,³⁹¹ unattainable, or both.³⁹² Thus, in custody and visitation disputes, rights of parties to practice freedom of thought about parenting as protected by the First Amendment are endangered by court referrals to informal processes that are often only nominally voluntary.

for explicit or coercive means of social control, since most individuals voluntarily consent to attitudes and behaviors which are sanctioned by the ideology.”).

³⁸⁷ See *id.* at 142 (“Even when mediation is not mandatory, many private mediators believe that it is their responsibility to advocate in the best interests of the child and they believe that joint custody represents that interest.”).

³⁸⁸ See Barry, *supra* note 381, at 771–72 (“Over the past two decades, joint custody has been the solution *a la mode*. Joint custody ostensibly strives for gender equity in its allocation of parental rights and obligations. Unfortunately in its preoccupation with parents this approach tends to invert the wisdom of Solomon by instructing the courts to divide the child in the name of settling the parents conflicting claims.”).

³⁸⁹ See Fineman, *supra* note 373, at 745 (“Divorce requires parents to ‘decouple from their former marital and nuclear roles and begin to recouple at a level of shared parenting responsibilities.’”).

³⁹⁰ See *id.* at 751 (“When forced to choose between parents, helping professionals preferred the parent who would most freely allow the child access to the other parent. The notion of ‘the most generous parent’ became synonymous with the determination of who was the better parent.”).

³⁹¹ See *id.* at 769 (“[A]n unrealistic and idealized version of shared parenting independent of the relationship (or lack thereof) between parents is now imposed on couples after divorce”).

³⁹² See GRUBB & LAZERSON, *supra* note 126, at 37 (“Ever since the early nineteenth century, alarms about family life have usually expressed fears that lower-class children have not been socialized in appropriate ways—to obey laws, to obey their superiors, and to accept the ethic of self-improvement through individual effort—rather than concern about the ravages of poverty on children.”).

D. Tort Law Protections of Privacy

The effort to define a private sphere that is not only free from intrusion by the government, but from other people as well,³⁹³ creates a conflict between the right to know and the right to be let alone—between privacy and free speech.³⁹⁴ For over thirty years following Warren and Brandeis' article, state courts attempted to determine whether a right to privacy existed.³⁹⁵ In privacy cases, litigation could be pursued in the same way one might sue for slander or libel, although, in privacy cases the injury occurs even when the information made public is true.³⁹⁶ Justice Warren and Justice Brandeis concluded that intrusion into another's privacy is infringing on a property right: "In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed."³⁹⁷

Despite the enormous amount of scholarship on how to define privacy, there is still much debate about what it is.³⁹⁸ Privacy is often discussed as a result of the loss of it, rather than the positive aspects of retaining it.³⁹⁹ In 1915, Roscoe Pound discussed the evolution in the law to distinguish individual rights from group rights.⁴⁰⁰ Pound points out the contradiction in seeing the individual and the group as opposites, stating: "there is a social interest in the individual moral and social life."⁴⁰¹ Pound identified seven aspects of what he called "the interests of personality": 1) the right to

³⁹³ See ALDERMAN & KENNEDY, *supra* note 142, at 155 ("Warren and Brandeis were arguing for a right against private individuals—friends, neighbors, employers and especially members of the press.").

³⁹⁴ See Emerson, *supra* note 345, at 20 ("The clash between the right of privacy and the right to know is obvious. One is almost the exact opposite of the other. Indeed, the right of privacy has been defined by some as the right not to disclose information about oneself to others, or the right to control the dissemination of information about oneself.").

³⁹⁵ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 386 (1960).

³⁹⁶ See ALDERMAN & KENNEDY, *supra* note 142, at 165 ("It is the private facts tort in the right to privacy that most directly challenges, and clashes with, the right to a free press, because it is here that a person can sue the press for publishing the truth.").

³⁹⁷ See Warren & Brandeis, *supra* note 130, at 205.

³⁹⁸ See Thompson, *supra* note 31.

³⁹⁹ See *id.* at 440 ("In any attempt to define the scope of desirable legal protection of privacy, we move beyond the neutral concept of 'loss of privacy' and seek to describe the positive concept that identifies those aspects of privacy that are of value.").

⁴⁰⁰ See Pound, *supra* note 137, at 349 ("... the law slowly worked out a conception of private rights as distinguished from group rights.").

⁴⁰¹ See *id.*

physical integrity; 2) the right to free motion and locomotion; 3) the right to the use of natural media; 4) the right of property; 5) the right of free exchange and free contact; 6) the right of free industry; 7) the right of free belief and opinion.⁴⁰² These rights grant respect for each individual's freedom to chart a course in the world, to make his or her own mistakes, and to correct them.⁴⁰³

Since Pound, many legal scholars have weighed in on the issue of how to define privacy. In a pivotal article in 1960, based on his analysis of over three hundred cases, Dean Prosser isolated four aspects of tort privacy as: 1) intrusion on someone's seclusion or solitude; 2) public disclosure of private facts;⁴⁰⁴ 3) false light; 4) appropriation of someone's name or likeness for personal gain.⁴⁰⁵ Scholars have since referenced, and challenged, Prosser's categories.⁴⁰⁶

Perhaps in 1960 it would have been hard to imagine that less than twenty years later, petitioners in most civil courts would be routinely offered, guided, urged, or mandated into ADR processes in which they are essentially intruded upon—being expected to voluntarily disclose personal information to their adversaries. Despite rhetoric about the voluntary nature of mediation, many courts and mediators place considerable pressure on parties to agree to mediate.⁴⁰⁷ Unlike more familiar tort privacy cases involving the media,⁴⁰⁸ in

⁴⁰² See *id.* at 351, 354.

⁴⁰³ See Benn, *supra* note 143, at 8–9 (“[A] general principle of privacy might be grounded on the more general principle of respect for persons . . . To *conceive* someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his perception of the world changes, and correcting course as he perceives his errors.”).

⁴⁰⁴ See Bloustein, *supra* note 63, at 980 (“[T]he wrong here is not the disclosure itself, but rather the disclosure is a violation of a relationship of confidence. Disclosure, whether to one person or many, is equally wrongful as a breach of the condition under which the information was initially disclosed.”)

⁴⁰⁵ See Prosser, *supra* note 395, at 389.

⁴⁰⁶ See Bloustein, *supra* note 63, at 965–66 (“Thus, under Dean Prosser’s analysis, the much vaunted and discussed right to privacy is reduced to a mere shell of what it pretended to be. Instead of a relatively new, basic and independent legal right protecting a unique, fundamental and relatively neglected interest, we find a mere application in novel circumstances of traditional legal rights designed to protect well-identified and established social values.”).

⁴⁰⁷ See Hedeem, *supra* note 35.

⁴⁰⁸ See ALDERMAN & KENNEDY, *supra* note 142, at 157 (“[W]hen privacy torts go up against the First Amendment . . . they are most often used against the media. Then it is

mediation, parties are mutually⁴⁰⁹ subject to intrusion by their adversaries and the mediator. Even if fear of violence from the other party is not an issue, imbalance of power in the parties' relationship—whether with a spouse, landlord, boss, or corporation—puts parties in mediation in a position to have their privacy invaded.⁴¹⁰ Being asked to speak honestly and openly⁴¹¹ about the dispute with the person/s with whom the dispute occurred could place mediation participants in a precarious situation, trusting an adversary to uphold the agreement to confidentiality. Indeed, confidentiality is offered in mediation as a guarantee that although privacy *is* breached, the information will not be used elsewhere.⁴¹² The experience of privacy is normally associated with an environment in which there is leisure and space to explore aspects of ourselves without concerns about how society would view our choices.⁴¹³ Privacy allows us to decide with whom we wish to share our minds or bodies and who we wish to exclude.⁴¹⁴ In mediation, we are asked

a clash between the right to be let alone and the right to know, a clash between privacy and the press.”).

⁴⁰⁹ While all parties are taking a risk in trusting that the other party will comply with confidentiality, it may not place all parties at an equal risk. Given social differences, some parties may reveal more, or have more vulnerability in being exposed. *See, e.g.,* Grillo, *supra* note 278, at 1607 (“To the extent that women are more likely than men to believe in communication as a mode of conflict resolution and to appreciate the importance of an adversary’s interests, this system does not always suit their needs.”).

⁴¹⁰ See Bloustein *supra* note 63, at 1003 (“[O]ur law of privacy attempts to preserve individuality by placing sanctions upon outrageous or unreasonable violations of the conditions of its sustenance. This, then, is the social value served by the law of privacy, and it is served not only in the law of tort, but in numerous other areas of law as well.”).

⁴¹¹ John R. Silbar, *Masks and Fig Leaves*, in PRIVACY 234 (J. Roland Pennock and John W. Chapman, eds. 1971) (“Complete openness and honesty are wholly beneficial only in relation with a wholly benevolent Other. Complete openness is possible only to an omniscient Other. In the absence of an all-knowing and loving God, complete openness is both impossible and dangerous.”).

⁴¹² Douglas J. Sylvester and Sharon Lohr, *The Security of Our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice*, 83 DENV. U. L. REV. 184, (2005-2006) (“Confidentiality is closely associated with information privacy as used by the law and, specifically, with the concern for secondary uses.”).

⁴¹³ See Gavison, *supra* note 169, at 448 (“[P]rivacy builds on the way in which it severs the individual’s conduct from knowledge of that conduct by others. Privacy thus prevents interference, pressures to conform, ridicule, punishment, unfavorable decisions, and other forms of hostile reactions.”).

⁴¹⁴ See Gerety, *supra* note 61, at 268 (“Invasions of privacy take place whenever we are deprived of control over such intimacies of our bodies and minds...from the access of

to trust that sufficient mechanisms are in place to protect privacy, that outweigh the risks of disclosing private information.⁴¹⁵

It might seem an exercise in futility to argue for protection of tort privacy in mediation when we live in a social climate in which many people seek out opportunities to disclose enormous amounts of personal information about themselves.⁴¹⁶ Social networking sites, internet dating, group e-mail lists, publicly held cell phone conversations, etc., might indicate that privacy is not highly valued in the twenty-first century. The danger of identity theft, computer hackers, and both corporate⁴¹⁷ and government access to enormous amounts of private information especially since 9/11,⁴¹⁸ would seem to nullify any attempt to preserve privacy under any circumstances. Yet mediation proponents have made privacy, through the mechanism of confidentiality, a cornerstone in their appeal to parties to forego other legal remedies in favor of mediation. This indicates that in the context of

the uninvited ...We should be able to share our intimacy with others only as we choose.”).

⁴¹⁵ See Gavison, *supra* note 169, at 459 (“Invasions of privacy are hurtful because they expose us; they may cause us to lose our self-respect, and thus our capacity to have meaningful relations with others.”).

⁴¹⁶ Bobbie Johnson, *Privacy no longer a social norm, says Facebook founder*, GUARDIAN.CO.UK. (January 11, 2010, 01:58 GMT), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy> (last visited Feb. 17, 2012) quoting Mark Zuckerberg at the Crunchie awards in San Francisco...”. . . .“People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people.... . That social norm is just something that has evolved over time.”

⁴¹⁷ Shelly Palmer, *Facebook Privacy: An Oxymoron*, DIGITAL LIVING, (December 13, 2009), <http://www.shellypalmermedia.com/2009/12/13/facebook-privacy-an-oxymoron/> (last visited Feb. 17, 2012) (discussing privacy dangers of Facebook: “The real danger to your privacy is not from your friends or friends of friends, it’s from Facebook itself. These new settings are structured to make your data more available, not less. . . . Why? Facebook is now competing with Twitter to be the realtime data and brand sentiment engine of choice. They need your status updates and behaviors to be available to them or they can’t repackage you and sell the data.”

⁴¹⁸ Eric Lichtblau and James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, Washington, (June 23, 2006), at <http://www.nytimes.com/2006/06/23/washington/23intel.html> (last visited Feb. 17, 2012) (“Under a secret Bush administration program initiated weeks after the Sept. 11 attacks, counterterrorism officials have gained access to financial records from a vast international database and examined banking transactions involving thousands of Americans and others in the United States, according to government and industry officials.”).

mediation and law, privacy is still considered a principle that merits being safeguarded.⁴¹⁹

III. WHAT IS CONFIDENTIALITY?

A. Defining Confidentiality

1. Wigmore's Exclusions

Tracing the confidentiality privilege⁴²⁰ to its roots in English law, Wigmore lists four criteria to determine whether someone may be excused from the duty to give testimony:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) The element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be in one which in the opinion of the community ought to be sedulously *fostered*;
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. (emphasis in original)⁴²¹

Wigmore finds spousal privilege, attorney–client privilege, privilege among jurors, and a privilege between the government and informers acceptable based on these four criteria. He questions the privilege when applied to physician–patient and priest–penitent.⁴²² Applying a confidentiality privilege to mediation is even more problematic since it is

⁴¹⁹ See Bloustein, *supra* note 63, at 973–74 (“[O]ur Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. . . . He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.”).

⁴²⁰ See Gibson *supra* note 4, at 33 (“A privilege is a blanket protection from testimony, usually based on the special relationship between parties . . . The key premise in this line of reasoning is that a confidential relationship is considered necessary for the function of the office.”).

⁴²¹ See Wigmore, *supra* note 347, § 2285 at 3185.

⁴²² See *id.* at 3186.

often unclear who holds the privilege, thus raising a question regarding Wigmore's criterion (2)—whether confidentiality is essential to the relationship.⁴²³ Unlike other applications of testimonial privilege, in mediation opposing parties must also agree to keep one another's confidences.⁴²⁴ Wigmore's criterion (3) raises questions regarding mediation as an accepted institution in society—it has been argued that a mediator-party relationship is not comparable to a lawyer-client or spousal relationship.⁴²⁵ In addition, statutes and court rules that grant broad confidentiality protection⁴²⁶ call into question the relationship of a mediation confidentiality privilege to other statutes, rules, and policies that support public access to the courts.⁴²⁷ The court is responsible for protecting innocent third parties, enforcing criminal laws, and providing fairness in the process.⁴²⁸ Finally, it is argued that the broad statutory protections of confidentiality in mediation constitute an incursion into the court's responsibility to oversee and sanction litigants and attorneys.⁴²⁹

⁴²³ See Deason, *The Quest for Uniformity*, *supra* note 1, at 81 (An attorney, doctor, or priest is consulted as a trusted figure who will act or provide advice in the party's best interest. ... Within mediation, in contrast, the initial level of trust is far lower. ... The mediator is not a trusted counselor, but merely a neutral.”).

⁴²⁴ See Deason, *supra* note 150.

⁴²⁵ See Hyman, *supra* note 2, at 20 (“A lawyer-client privilege will only apply within a lawyer-client relationship. A spousal privilege requires that the parties be united in the bonds of matrimony. These institutions are both socially recognizable and have elaborate sets of rules and standards that govern whether the privileged relationship exists. The same cannot be said of ‘mediation.’”).

⁴²⁶ See Thompson, *supra* note 54, at 330 (“The over inclusive language tends to promise complete and total confidentiality without accommodating conflicting policies, statutes, rules, and principles of justice that require limited exceptions to the general rule of confidentiality in mediation sessions.”).

⁴²⁷ See Miller, *supra* note 54, at 429 (“The right of public access to court proceedings and records derives from our English common law heritage. It exists to enhance popular trust in the fairness of the justice system, to promote public participation in the workings of government, and to protect constitutional guarantees.”).

⁴²⁸ See Thompson, *supra* note 54, at 334 (“In their efforts to protect confidentiality in mediations, the legislature and courts have failed to take into account conflicting duties and responsibilities created by other statutes and rules as well as legitimate concerns about other important public policies, such as protecting innocent third parties, enforcing criminal laws and providing simple fairness to the participants in the dispute resolution process.”).

⁴²⁹ See Weston, *supra* note 7, at 35 (“The strong statutory protection for mediation confidentiality threatens a court's traditional power to monitor the litigation process and

2. Confidentiality in the US Census

There are precedents for the promise of confidentiality in U.S. history. One example is the Federal Census. The federal government has gathered information for statistical purposes⁴³⁰ every ten years, since 1790. Prior to 1850, the results of the census were posted in public places.⁴³¹ Due to the increased reluctance of the populace to participate voluntarily, public posting of the census results was discontinued.⁴³² Concerns for privacy were addressed by having census workers take an oath to keep all information confidential.⁴³³ By 1890, when this remedy was not seen as sufficient, Congress passed legislation to criminalize disclosures, attaching both civil and criminal penalties to charges brought against any person who breached the public trust by disclosing information gathered for government statistical purposes.⁴³⁴ Despite these measures, it is now acknowledged that the U.S. Census Bureau produced a report two days after the attack on Pearl Harbor on December 9, 1941, that listed details regarding Japanese-American populations in selected cities.⁴³⁵ The Commerce Department had the

to sanction parties and attorneys when the offending conduct occurs in a court-connected mediation context.”).

⁴³⁰ See Sylvester & Lohr, *supra* note 412, at 152 (“The concept of confidentiality, although linked in part to an evolving sense of human dignity and entitlement, was used mainly to encourage citizen compliance with data collection requests. Indeed, the concept of confidentiality in law appears to have been little more than a tool for fostering trust between data subjects and federal statistical agencies—a trust that submitted data would only be used for the purposes for which it was originally submitted.”).

⁴³¹ See *id.* at 155–56.

⁴³² See *id.* at 157 (“The increase in questions and the rise of individual mistrust of government uses of data led to the first frameworks for assuring confidentiality of census data ...”).

⁴³³ See *id.* at 158–59 (“By the mid-nineteenth century, various directives were issued ordering that census data be kept strictly confidential.”).

⁴³⁴ See *id.*

⁴³⁵ James Bovard, *The 2010 Census: Will Your Answers Stay Private?*, CHRISTIAN SCI. MONITOR, (March 24, 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/0324/The-2010-Census-Will-your-answers-stay-private> (last visited Feb. 17, 2012) (“Until a decade ago, the bureau denied any improper role in the internment. Two researchers in 2000 provided so many smoking gun documents that the bureau finally admitted some culpability. But it proudly declared that it had never provided the names and addresses of specific Japanese-Americans to law enforcement or the military.”).

authority to fulfill interagency requests⁴³⁶ and released the information. Based on the Second War Powers Act of 1942, the protection granted for confidentiality in the census was temporarily repealed (lawmakers restored it in 1947).⁴³⁷ In the 1970s, when the public became aware of abuses in law enforcement surveillance practices, several new laws were put in place to restore faith in the government's promise to protect private information.⁴³⁸ Once again, however, disregarding promises of confidentiality, in 2003–2004 the State Department supplied information on the number of Arab-Americans living in the U.S. by ZIP code, to the Department of Homeland Security.⁴³⁹

1. *The Uniform Mediation Act (UMA)*

In an effort to create consistency in regulation of mediation, particularly in defining confidentiality,⁴⁴⁰ the UMA (Uniform Mediation Act)⁴⁴¹ was drafted jointly by the National Conference of Commissioners of Uniform State Laws (NCCUSL) and the Dispute Resolution Section of the American Bar Association (ABA). A few states have, with modifications, adopted it.⁴⁴² In Section 4⁴⁴³ the UMA spells out the confidentiality privilege⁴⁴⁴:

⁴³⁶ J.R. Minkel, *Confirmed: The U.S. Census Bureau Gave Up names of Japanese-Americans in WW II*, SCI. AM., March 30, 2007, <http://www.scientificamerican.com/article.cfm?id=confirmed-the-us-census-b>. (last visited Feb. 17, 2012).

⁴³⁷ See *id.*

⁴³⁸ See Sylvester & Lohr, *supra* note 412, at 173 (“The privacy Act’s, FERPA’s, FCRA’s and other laws’ prohibitions on secondary uses were intended to counteract ... fears and restore confidence in the benign and beneficial nature of government purpose.”).

⁴³⁹ See Bovard, *supra* note 435.

⁴⁴⁰ Philip J. Harter, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, ILL. U. L. REV. 255 (Spring 2002) (“Until the very last meeting of the drafting committee, the entire thrust of the proposed UMA was the evidentiary privilege.”).

⁴⁴¹ UNI. MEDIATION ACT (Last Revised or Amended in 2003) Drafted by the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm#TOC1_4.

⁴⁴² Gary Provencher, *The Uniform Mediation Act: An Analysis of Current State Acts*, THE MAYHEW-HITE REPORT, (2006-2007), <http://moritzlaw.osu.edu/jdr/mayhew-hite/vol5iss1/index.html> (last visited Feb. 13, 2012).

⁴⁴³ See UNI. MEDIATION ACT, *supra* note 441.

⁴⁴⁴ See Hughes *supra* note 10, at 36 (“If protecting confidentiality represented the predominant mission of the drafting committees, the creation of a mediation privilege and the protections it will provide for mediators epitomizes the heart and soul of this effort.”).

SECTION 4. PRIVILEGE AGAINST DISCLOSURE: ADMISSIBILITY;
DISCOVERY.

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection(b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Critics point out that the UMA grants a privilege that goes beyond the expectations of confidentiality in other professional relationships.⁴⁴⁵ In granting a privilege to the mediator,⁴⁴⁶ parties may be prevented from introducing evidence,⁴⁴⁷ even if they decide to waive their privilege.⁴⁴⁸ The mediation privilege is therefore unlike lawyer-client or doctor-patient privilege in which the clients or patients hold the privilege and it is the duty

⁴⁴⁵ See *id.* at 37 stating that: “[T]he idea of extending the privilege to the agent or helper is unique among all the professional relationships.”

⁴⁴⁶ Paul Dayton Johnson, Jr., *Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act?* 30 FL. ST. U. L. REV. 499 (2003) (“In other confidential relationships, such as attorney-client privilege, on which the UMA provision is based, ‘the privilege against testifying belongs to the part[ies] and can be waived.’ Under the UMA, mediators have a separate privilege and can refuse any request to testify.”)

⁴⁴⁷ See Harter, *supra* note 440, at 254 (“[T]he mediator can refuse a discovery request for or refuse to testify about a mediation communication, but the mediator cannot block others from doing so.”).

⁴⁴⁸ See Gibson, *supra* note 4, at 33 (“The lawyer-client privilege can be waived by the client ... leaving his or her lawyer no standing to enforce confidentiality. In this sense the lawyer-client privilege is possibly better thought of as a *client* privilege... typically mediator-client privileges *cannot* be waived by the client alone ... ”) (emphasis in original).

of the professional to protect it. The UMA would override rules of evidence routinely used to distinguish between unreliable information and probative evidence.⁴⁴⁹ The UMA creates a privilege that exceeds protections of settlement negotiations under rules of evidence, such as Federal Rule 408,⁴⁵⁰ “depriving our courts as well as the victims of wrongdoing from access to essential evidence that could result in a manifest injustice.”⁴⁵¹ The broad privilege protecting mediators⁴⁵² interferes with the authority of the court to find the truth,⁴⁵³ and undermines self-determination of the parties.⁴⁵⁴ The final version of the UMA leaves the responsibility to the parties⁴⁵⁵ to create restrictions,⁴⁵⁶ often without awareness of the limitations to such contracts.⁴⁵⁷

⁴⁴⁹ See Hughes, *supra* note 10, at 32–33.

⁴⁵⁰ Stephen A. Hochman, *What's Wrong with the Uniform Mediation Act, and How to Fix It*, Copyright 2003 Stephen A. Hochman, at 1.

⁴⁵¹ See *id.* at 2.

⁴⁵² See Harter, *supra* note 440, at 263 (“[T]here tended to be an absolutism, and a view that only the mediator could make various decisions, that fails to recognize that while mediation is an important means to self-determination and an important means to making hard decisions, there are other, competing considerations that must at times be balanced.”).

⁴⁵³ See Hughes, *supra* note 10, at 77 (“Under the language in the UMA, confidentiality, as a means, is no longer promoting the ends of self-determination. To the extent that mediation confidentiality impairs the parties’ self-determination, the mediation privilege should yield to self-determination and to the court’s ability to determine the truth.”).

⁴⁵⁴ See *id.* (“If the parties access to justice is hampered, or is so restricted by the UMA as to be virtually non-existent, any relationship between the results achieved in mediation and self-determination will be merely coincidental.”).

⁴⁵⁵ See Harter, *supra* note 440, at 260 (“The incarnation of confidentiality in the final version of the UMA raises concern. It no longer provides for a common law evolution of confidentiality but instead authorizes the parties themselves to define its parameters beyond the testimonial privilege.”).

⁴⁵⁶ See Kuester, *supra* note 48, at 577 (“Currently, almost every mediation begins with the mediator eliciting a promise from the parties that all proceedings will be held in confidence. This ‘promise’ is often made in the form of a written release or consent form.”).

⁴⁵⁷ See Harter, *supra* note 440, at 260 (“[S]omewhere the UMA should indicate there are limits on the ability to contract for complete confidentiality ... the [Model Standards of Conduct for Mediators] recognize in the confidentiality provision that there are limits to confidentiality based on public policy.”).

In contrast to the broad privilege defined in Section 4, the UMA acknowledges court authority to override confidentiality, providing only two exceptions in Section 6(b)⁴⁵⁸:

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

- (1) a court proceeding involving a felony [or misdemeanor]; or
- (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

Thus, despite the effort to provide consistency, the UMA does not and cannot guarantee protection of confidentiality in all circumstances.⁴⁵⁹ Although mediators may continue to believe that everything said in mediation is confidential,⁴⁶⁰ there is, in fact, no way to predict when something said in mediation may become necessary evidence in another case in another jurisdiction.⁴⁶¹

4. Mediators' Responsibilities to Define Exceptions to Confidentiality

In addition to court authority to override confidentiality, mediators themselves are in the position of having to decide when circumstances warrant disclosure of information. Laws requiring professionals to report do

⁴⁵⁸ UNI. MEDIATION ACT, *supra* note 441, at § 6(b).

⁴⁵⁹ See Hughes, *supra* note 10, at 54 (“[E]ven if the language receives uniform enactment by the states, which is doubtful, it will not receive uniform enactment by the courts.”).

⁴⁶⁰ See Harter, *supra* note 440, at 251 (“Parties regularly expect that what they tell the mediator in confidence will remain just between them, and mediators regularly promise virtually complete confidentiality to the participants.”).

⁴⁶¹ See *id.* (“...[T]he parties can never know just where a challenge to confidentiality might be brought or even whether it will be directly related to the subject on the table.”).

CONFIDENTIALITY IN MEDIATION

not exempt privileged relationships.⁴⁶² In making a decision to disclose information, mediators must make an assessment based on ethical terms which are not well defined,⁴⁶³ such as those spelled out in the UMA Section 6 (a)(7):

SECTION 6. EXCEPTIONS TO PRIVILEGE

(a) There is no privilege under Section 4 for a mediation communication that is:

(7) sought or offered to prove or disprove abuse, neglect, abandonment or exploitation in a proceeding in which a child or adult protective services agency is a party

Ultimately, mediators must know what they are obligated to report, and what is permissible to report. Mediators should define the terms by which they must judge whether disclosure of information is required, and inform parties of their standards.⁴⁶⁴

A comparison can be made between confidentiality offered in mediation and that offered to participants in government statistical surveys. In both examples, individuals are asked to reveal private information that is protected after the fact by assurances that it will not be used for secondary purposes.⁴⁶⁵ However, confidentiality in mediation is more complex in that these assurances must be given not only by representatives of government (in this case mediators), but also by the other parties. While confidentiality in mediation has been granted through statutes and court rules in most states,⁴⁶⁶

⁴⁶² See Gibson *supra* note 4, at 52 (“Most reporting laws also state that no one shall be relieved of the duty to report because of the privileged or confidential nature of the communications.”)

⁴⁶³ See *id.* at 55 (“Definitions of key ethical terms vary, and they are open to diverse interpretation. Therefore mediators need to be made more aware of what constitutes grounds for disclosure.”)

⁴⁶⁴ See *id.* at 64 (“Codes of conduct do not provide neat algorithms for all cases in circumstances Even within a code, there will be latitude for personal decisions. *Obligatory* disclosure is a function of the codes of ethics that are established in mediation. *Permissible* disclosure is a function of the beliefs and values of the individual mediator and it is incumbent on the mediator to inform his or her clients of the approach and standards that will be used in the mediation process.”) (emphasis in original).

⁴⁶⁵ See Sylvester & Lohr, *supra* note 412, at 184 (emphasis in original).

⁴⁶⁶ See Thompson, *supra* note 54, at 330 (“The uncertainty in the concept of confidentiality is compounded by the vast array of overlapping common law decisions,

as well as by the federal government,⁴⁶⁷ assurances that protections are in place regarding confidentiality may be subject to pressures similar to those brought to bear on the Census Bureau during World War II.⁴⁶⁸ In addition to the potentially chilling effect of the USA PATRIOT Act on confidentiality (which will be addressed in Part IV), even confidentiality in lawyer–client relationships, is not sacrosanct since 9/11.⁴⁶⁹

B. An Overview of Statutes and Rules on Confidentiality in Mediation in the Fifty States and the District of Columbia

Six states specifically name mediation as private,⁴⁷⁰ thereby making a direct connection between confidentiality and privacy. Stipulations regarding confidentiality are present in statutes and rules governing mediation programs and practices, in forty-nine states⁴⁷¹ and the District of Columbia.

statutes, court rules and professional standards that address these issues with broad over inclusive language.”).

⁴⁶⁷ See Hughes, *supra* note 10, at 17 (“As of 1994, the legislatures of the several states and the federal government had enacted 2000 statutes, more than double the number from five years prior ... estimates now raise the number of statutes with provisions affecting mediation to 2500.”).

⁴⁶⁸ See Madrinan, *supra* note 194, at 795 (“President Bush signed H.R. 3162, now re-titled as ‘The USA PATRIOT Act of 2001,’ at a ceremony held in the White House East Room. In his remarks that day, President Bush declared: ‘This government will enforce this law with all the urgency of a nation at war.’”).

⁴⁶⁹ See Rotenberg, *supra* note 91, at 1118–19 (“[T]he USA PATRIOT Act is not the only means by which privacy provisions in the United States have been diminished since September 11. The attorney-general has also indicated that attorney-client privilege, one of the oldest privileges in common law, may be violated by police.”).

⁴⁷⁰ ALA. CODE § 6-6-20; ALASKA RULES OF CIV. PROCEDURE P. PART XIII GENERAL PROVISIONS RULE 100; DEL. COURT OF CHANCERY CH. RULE 174; MINN. GEN. R. PRACTICE TITLE II RULE 114; N.HAMPSHIRE H. SUPERIOR SUP. COURT. RULE 170; OK. CHOICE IN MEDIATION ACT § 12-1836;.

⁴⁷¹ New York State has no general statute or court rule on mediation or confidentiality. There are some localities that have established rules and there are some specific areas where mediation is offered such as Education Law §4404-a Mediation program for Students with Disabilities; or the Family Court Act §1018 Conferencing and Mediation. In addition, Judiciary Law §849-b. Establishment and administration of centers; is applicable statewide.

1. Mediation Statutes are Categorized Under: Civil Procedure, the Judiciary, Evidence, or Independently

In fourteen states the statutes regulating mediation fall under headings for civil practice or procedures,⁴⁷² thus locating mediation within the realm of due process.⁴⁷³ If mediation is listed with other civil procedures offered by the courts, does this confirm mediation as a site of due process protection, or does consent to mediation nullify substantive due process?⁴⁷⁴ Does consent also require parties to forfeit the right to procedural due process?⁴⁷⁵ Do courts consider it within their authority to oversee parties' rights to

⁴⁷² CODE OF ALA. CODE TITLE 6 CIVIL PRACTICE CHAPTER 6 REMEDIES § 6-6-20 (1975); ALASKA RULES R. OF CIVIL CIV. PROCEDURE P. PART XIII GENERAL PROVISIONS RULE 100; ARIZ. REVISED REV. STATUTES STAT. TITLE 12 COURTS AND CIVIL PROCEEDINGS ARTICLE 4 § 12-2238; ARK. CODE TITLE 16 PRACTICE, PROCEDURES & COURTS § 16-7-206; CONN. GENERAL GEN. STATUTES STAT. CHAPTER 900 COURT PRACTICE AND PROCEDURE § 52-235; ILLINOIS ILL. CODE RIGHTS AND REMEDIES § 710 ILCS 35/ UNIFORM MEDIATION ACT; LA. LOUISIANA CODE TITLE 9 CIVIL CODE ANCILLARIES §4101-4112 LOUISIANA MEDIATION ACT; MONTANA CODE ANNOTATED TITLE 25 CIVIL PROCEDURE CHAPTER 21 RULE 7; NEBRASKA NEB. CODE CHAPTER 25 COURTS CIVIL PROCEDURE §§25-2901 TO 25-2911 DISPUTE RESOLUTION ACT AND §§25-2930 TO 25-2943 UNIFORM MEDIATION ACT; NEW MEXICO CHAPTER 44 MISCELLANEOUS CIVIL LAW MATTERS §§44-7B-1 TO 44-7B-6 MEDIATION PROCEDURES ACT; OKLAHOMA STATUTES TITLE 12 CIVIL PROCEDURE §§1821-1825 DISTRICT COURT MEDIATION ACT AND §§1831-1836 CHOICE IN MEDIATION ACT; TEXAS. STATUTES STAT. CIVIL PRACTICE AND REMEDIES TITLE 7 §154; VIRGINIA CODE CIVIL REMEDIES AND PROCEDURES 20.2 §§8.01-576.4 TO 801-576.12 AND 21.2 §§8.01-581-21 TO 8.01-581.26; WYOMING STATUTES TITLE 1 CODE OF CIVIL PROCEDURE §§1-43-101 TO 1-43-104.

⁴⁷³ CORNELL UNIVERSITY LAW SCHOOL, *LII LEGAL INFORMATION INSTITUTE*, http://topics.law.cornell.edu/wex/due_process (last visited Feb. 17, 2012), Introduction at paragraph 1, defining due process ("These words have as their central promise an assurance that all levels of American government must operate within the law...and provide fair procedures.").

⁴⁷⁴ See Reuben, *supra* note 15, at 615 ("[I]t is striking that court-related ADR processes have not yet been subjected to constitutional scrutiny for due process violations or other trespasses. As such programs become even more pervasive, and as courts and practitioners become more sensitive to the constitutional dimensions of the ADR movement, this situation seems almost certain to change.").

⁴⁷⁵ Andrew T. Hyman, *The Little Word 'Due'*, 38 AKRON. L. REV. 3 (2005) ("[T]he word 'process' encompasses both substantive and procedural aspects as Congress indicated when it passed the Process Act of 1789. Were it not for the technical way that Congress used and understood the word 'process' in 1789, that word would have to be construed today according to its ordinary procedural meaning, rather than as having substantive content also.").

procedural due process in mediation?⁴⁷⁶ Due process requires a hearing of facts prior to judgment.⁴⁷⁷ Can mediation be considered a site of due⁴⁷⁸ process when parties are often told that mediation is not about facts or judgments?⁴⁷⁹ It is beyond the scope of this article to debate these questions or to propose a solution regarding the place of mediation in relation to other due processes.⁴⁸⁰ It is important, however, to raise such questions, and to call on the mediation community to address them.⁴⁸¹ If, as in the fourteen states listed, mediation is included as a civil procedure, information about the laws and standards by which due process is measured should be provided for parties who are considering whether or not to participate in mediation.

In twenty-seven states and the District of Columbia, regulation of mediation falls under the judiciary or court rules,⁴⁸² clearly giving courts the

⁴⁷⁶ See Welsh, *supra* note 267, at 180 (“Given the current state of procedural due process jurisprudence, courts may lack both the desire and the ability to demand procedural justice in third party processes that are classified as ‘consensual.’”).

⁴⁷⁷ BALLENTINE’S LAW DICTIONARY, *supra* note 359, at 380 (“[W]herein he declared that by due process of law is meant ‘the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.’”) (quoting Daniel Webster).

⁴⁷⁸ See Hyman, *supra* note 475, at 4 (“In the context of the Fifth Amendment, the word ‘due’ simply means ‘owed’ according to the ‘law of the land,’ and the Fourteenth Amendment was meant to adopt that same meaning.”).

⁴⁷⁹ See Hensler, *supra* note 257, at 17 (“Indeed, mediators often begin the process by distinguishing mediation from fact gathering and judgment, and continue to emphasize this distinction as the process unfolds.”).

⁴⁸⁰ See Hyman, *supra* note 475, at 28 n.66 (“... Justice Scalia has also said that ‘It is precisely the historical practices that define what is “due”’... However, Justice Scalia nevertheless has conceded that a departure from tradition may be ‘due’ if it subjectively appears to be fundamentally fair (“‘Fundamental fairness’ analysis may appropriately be applied to departures from traditional American conceptions of due process...”)).

⁴⁸¹ See Welsh, *supra* note 267, at 180 (“[D]isputants’ decision control, which is meaningful to mediation advocates and the courts but a rather hollow promise for disputants, may have the unfortunate effect of hindering the institutionalization of procedural justice in consensual, court-connected processes.”).

⁴⁸² COL. REV. STAT. § 13-22-307 (1991); DEL. CH. R. 174; D.C. CODE § 16-4201-4213 (2006); D.C. CIR. CIV. R. § LCvR 84.9; FLA. STAT. §§ 44-102-108 (2005); FLA. STAT. § 44.201 (2004); FLA. STAT. §§44.401-406 (2004); GA. CODE ANN. §1 5-23-1-12 (1997); IOWA CODE § 679C.1-5 (repealed 2005); KY. R. ANN. MEDIATION R. 12; ME. REV. STAT. tit. 4, § 18-B (2009); ME. R. CIV. P. 16B; MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-06C (West 2005); MASS. GEN. LAWS ch. 233, § 23C (1985); MICH. R. CIV. PRO. 2.410-411; MINN. GEN. R. PRACTICE 114.01-14; MISS. R. MEDIATION EXHIBIT A; MO. S. CT. R. 17.01-07; NEV. REV. STAT. § 48.109 (1993); N.H. SUP. CT. R. 170; N.J. CT. R.

authority and responsibility to monitor and regulate mediation.⁴⁸³ In five states the mediation statutes and rules are found in chapters on evidence,⁴⁸⁴ in effect demonstrating that the purpose of a confidentiality privilege is to determine what is protected if the mediation does not result in agreement and the dispute is litigated. In one state the mediation statute is found in the section on offices and administration,⁴⁸⁵ and in the remaining four states,⁴⁸⁶ an independent statute or section is allocated to mediation or alternative dispute resolution.

2. Differences Among Statutes and Rules on Confidentiality

A comparison of all aspects of the statutes and rules among the fifty states and the District of Columbia would be valuable in assessing the range of practices under the heading of mediation. The scope here is limited to identifying differences in the regulations in reference to confidentiality only. Inconsistencies remain among the state statutes and rules on confidentiality regarding who is the holder of the privilege,⁴⁸⁷ what circumstances justify overriding confidentiality,⁴⁸⁸ and what enforcement provisions may be in

1:40-1-12; N.Y. JUD. LAW. § 849-b (McKinney 1986); N.C. GEN. STAT. § 7A-38.1 (2009); N.D. R. CT. 8.8; OHIO REV. CODE ANN. §§ 2710.01-10 (West 2004); 42 PA. CONS. STAT. § 5949 (1996); R.I. GEN. LAW § 9-19-44 (1992); S.C. R. ALTERNATIVE DISP. RESOL. 6-8; TENN. S. CT. R. 31, §§ 1-24; UTAH CODE ANN. §§ 78B-10-101-114 (West 2008); W. VA R. TRIAL CT. 25.01-16.

⁴⁸³ See Meador, *supra* note 176, at 180 (“[I]nherent authority is part of a broader topic of judicial management of litigation. That topic, involving the extent to which a trial court should affirmatively assert authority—inherent or otherwise—over its proceedings, has sparked much debate over the past two decades.”).

⁴⁸⁴ CAL. EVID. CODE §§ 1115-1128 (West 1997); HAW. REV. STAT. § 626-1 (1989); IDAHO CODE ANN. §§ 9-801-814 (2008); S. D. CODIFIED LAWS §§ 19-13A-1-15 (2008); S. D. CODIFIED LAWS § 19-13A-32 (2008); WIS. STAT. § 904.085 (2000).

⁴⁸⁵ IND. CODE §§ 4-21.5-3.5-1-27 (1996).

⁴⁸⁶ KAN. STAT. ANN. §§ 5-501-518 (1996); OR. REV. STAT. §§ 36.200-238 (2003); VT. STAT. ANN. tit. 12, §§ 5711-5723 (2005); WASH. REV. CODE. §§ 7.07.010-904 (2006).

⁴⁸⁷ See Deason, *The Quest for Uniformity*, *supra* note 1, at 90-91 (“The designation of holders is important because it defines the purposes that the privilege serves: a privilege held by the parties allows them to protect their expectation of confidentiality; one held by the mediator furthers mediator neutrality.”).

⁴⁸⁸ See *id.* at 104, 105 (“Most of the statutory exceptions to mediation confidentiality are based on policy judgments that in specific circumstances the need for disclosure exceeds the benefit of maintaining mediation confidentiality.”).

place if confidentiality is breached.⁴⁸⁹ In sixteen states, there is no mention of a right to waive confidentiality.⁴⁹⁰ When parties are not given the option to waive confidentiality, then it might be said that the state is exercising the “privilege.” Removing the right to waive from the parties is certainly in conflict with self-determination.⁴⁹¹ In some states where the right to waive is not an option, the law or rule may still stipulate that a mediator must comply with any statute or rule imposing a duty to provide evidence.⁴⁹² Twenty-four states spell out the exceptions to confidentiality such as: intent to harm oneself or another, abuse and neglect of children or incapacitated adults, or intent to commit a crime.⁴⁹³ When a statute or rule specifies that mediation is protected as a settlement negotiation under Rules of Evidence as is the case in twelve states,⁴⁹⁴ the door is open for disclosure of the terms of the settlement or testimony regarding actions or statements that indicate bias, fraud, or duress.⁴⁹⁵ Thus, even in those states where parties may not have a right to waive confidentiality, they should still be informed that the

⁴⁸⁹ See Green, *supra* note 3, at 6 (arguing that defining confidentiality includes specifying mechanisms for enforcing it).

⁴⁹⁰ Alaska, Arkansas, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, Missouri, Montana, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Wisconsin.

⁴⁹¹ Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 92–93 (Spring 2001) (“Self-determination has been identified as the fundamental core characteristic of the mediation process. Nevertheless ... the existence and meaning of self-determination cannot be taken for granted.”).

⁴⁹² Alaska, Arkansas, Georgia, Hawaii, Kentucky, Maryland, Missouri, Montana, New Hampshire, North Carolina, Tennessee, Wisconsin.

⁴⁹³ ARIZ. REV. STAT. § 12-2238 (1993); CAL. EVID. CODE §§ 1124(c) (West 1997); COL. REV. STAT. § 13-22-307(b) (1991); D.C. CODE § 16-4205(3) (2006); FLA. STAT. § 44.405(4)(a)(2) (2005); GA. R. ALTERNATIVE DISP. RESOL. VII(A)-(B); IDAHO CODE ANN. § 9-806(c)(d)(g) (2008); 710 ILL. COMP. STAT. 35/3 (2004); IOWA CODE § 679C.3–4 (repealed 2005); KAN. STAT. ANN. §§ 5-512 (1996); ME. R. CIV. P. 16B(ii)-(iii); MD. R. ALTERNATIVE DISP. RESOL. 17-109; NEB. REV. STAT. § 25-2934(c) (2003); N.J. CT. R. 1:40-4(d); OHIO REV. CODE ANN. § 2710.04 (West 2004).

⁴⁹⁴ Alaska, California, Indiana, Kentucky, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Tennessee, West Virginia.

⁴⁹⁵ See Note, *supra* note 327, at 449 (“The rule [408] does not, for example exclude evidence offered to prove or challenge the actual agreement produced by the negotiations ... Moreover, the rule does not protect participants in negotiation who abuse the negotiation process by committing fraud or by violating a duty owed to another participant, such as a duty to bargain in good faith.”).

CONFIDENTIALITY IN MEDIATION

mediator's responsibilities might include the duty to testify as required by rules of evidence.⁴⁹⁶

The court is charged with balancing⁴⁹⁷ the protection of confidentiality in mediation⁴⁹⁸ against a greater public good that may be at stake.⁴⁹⁹ Some of the statutes and rules make clear the court's authority to override confidentiality. In thirteen states and the District of Columbia, there is specific reference to the power of the court to decide whether the search for truth outweighs the potential damage to the functioning of mediation.⁵⁰⁰ In nine states the language simply acknowledges that other laws or rules may take precedence over confidentiality.⁵⁰¹ Thus, while many mediators continue to make blanket statements assuring the protection of confidentiality in mediation, such statements are tenuous even in states where there is no right to waive it. In states where exceptions to confidentiality include vague statements such as "as by any law or rule,"⁵⁰² it is nearly impossible for mediators to adequately inform parties of the legal parameters surrounding confidentiality.

3. Statutes and Rules are the Reference Points for Mediation

One conclusion can be drawn from the overview of state regulations of mediation: confidentiality in mediation references the law. Despite contradictions between confidentiality statutes and rules of evidence,⁵⁰³ there

⁴⁹⁶ See Ehrhardt, *supra* note 59, at 119 ("[A] mediation privilege would prohibit the use of statements made during mediation and offered during trial to attack credibility, while Rule 408 may not.").

⁴⁹⁷ See Perino, *supra* note 4, at 11 n.60 (describing the "utilitarian balancing test often applied to privileges" based on Wigmore's four criteria.).

⁴⁹⁸ See Green, *supra* note 3, at 5 ("Recognition of a privilege in this situation is based on an institutional concern for mediation as an important and distinct resolution process, rather than a concern for the mediators' own professional interests.").

⁴⁹⁹ See Perino, *supra* note 4, at 11 ("In Dean Wigmore's words, the public interest protected must be substantial, 'because its admission would injure some other cause more than it would help the cause of truth, and because the evidence of that injury is considered of more consequence than the possible harm to the cause of truth.'").

⁵⁰⁰ Arkansas, Connecticut, District of Columbia, Idaho, Illinois, Mississippi, Nebraska, New Mexico, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin.

⁵⁰¹ Alabama, Alaska, Iowa, Kansas, Maine, Maryland, New Jersey, North Dakota, Virginia.

⁵⁰² VA. CODE § 8.01-581-22 (2002).

⁵⁰³ See Rosenberg, *supra* note 1, at 163 ("When dealing with the laws of privilege, the rules of evidence and conflicts of law run a collision course. While rules of evidence

can be no doubt that mediation falls within laws and rules created either by legislation or by the authority of the judiciary, not as an alternative to the law, but as an option within it. While state laws and court rules may seem remote in some circumstances, in fact, they form parameters around all mediations.⁵⁰⁴ Although mediation is labeled an “alternative” to litigation, it should not be misunderstood as an alternative to the law.⁵⁰⁵ The use of the term “alternative dispute resolution” by the courts has been confusing for mediators and parties. While the law is not the only reference point for decision-making norms⁵⁰⁶ it is misleading to claim, at least in court-referred mediation, that it is an opportunity for parties to make their own decisions without interference from the court.⁵⁰⁷

Explaining confidentiality to parties in mediation is analogous to the requirement that law enforcement officers inform suspects of their Miranda rights.⁵⁰⁸ A primary aspect of the orientation for mediation is informing

generally try to elicit the facts, the rules of privilege serve to cloak them in order to preserve other presumably greater interests.”).

⁵⁰⁴ See Nolan-Haley, *supra* note 8, at 839 (“At a minimum, rules governing disclosure of legal information in mediation should be broad enough to permit mediators to identify legal issues that may arise.”).

⁵⁰⁵ See Engler, *supra* note 113, at 2025 (“The voluntariness of an unrepresented litigant’s choices to settle or proceed to trial, to agree to particular terms of settlement, or to choose mediation in the first place, must be measured by the extent to which the litigant understands the risks of the alternatives, which in turn depends on the litigant’s understanding of the applicable law and facts.”).

⁵⁰⁶ See Welsh, *supra* note 491, at 17 (“Mediation advocates also rejected the notion that the law should serve as the exclusive source of substantive norms controlling discussion and decision making in the dispute resolution process.”).

⁵⁰⁷ See Nolan-Haley *supra* note 32, at 63 (“Whatever their original purpose in seeking the court’s intervention in their disputes, after referral to mediation, their dispute resolution activity takes place without the official power of law, but nonetheless under its aegis.”).

⁵⁰⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966), THE OYEZ PROJECT at IIT CHICAGO-KENT COLLEGE OF LAW, (last visited 14 February Feb. 14, 2012) http://www.oyez.org/cases/1960-1969/1965/1965_759 (“The Court held that prosecutors could not use statements stemming from custodial interrogation of defendants unless they demonstrated the use of procedural safeguards ‘effective to secure the privilege against self-incrimination.’ The Court noted that ‘the modern practice of in-custody interrogation is psychologically rather than physically oriented’ and that ‘the blood of the accused is not the only hallmark of an unconstitutional inquisition.’ The Court specifically outlined the necessary aspects of police warnings to suspects, including warnings of the right to remain silent and the right to have counsel present during interrogations.”).

CONFIDENTIALITY IN MEDIATION

parties about what is and is not confidential. Once the parties have gathered to mediate, most mediators will again carefully explain what is and is not confidential,⁵⁰⁹ and will have parties sign a confidentiality agreement. Signed confidentiality agreements formalize the parties' decisions regarding the court and other people, as a contract.⁵¹⁰ Parties must agree on the decision to maintain or waive confidentiality in relation to the court (in states where there is an option to waive). In addition, parties must stipulate the terms of any public disclosure,⁵¹¹ and can name those with whom they may wish to consult regarding issues discussed in mediation.⁵¹²

Confidentiality in mediation requires adversaries to contract⁵¹³ to protect one another's right to privacy.⁵¹⁴ Privacy gives each party the right to determine what information is relevant and must be disclosed, through the mechanism of self-determination. Agreeing to confidentiality intersects with the requirements that parties act in good faith⁵¹⁵ and have the capacity⁵¹⁶ and

⁵⁰⁹ See Kirtley, *supra* note 1, at 9 ("Mediators regularly require all present to promise to keep mediation discussions confidential, and routinely assure participants that the proceedings are confidential (whether or not legal protection is certain).").

⁵¹⁰ See *id.* at 10, 11 ("While such agreements may create expectations of confidentiality their enforceability is problematic. Because the law views courts as entitled to 'every [person]'s evidence, public policy forbids contracting to exclude evidence. Agreements between individuals are not permitted to restrict the court's access to testimony in its pursuit of justice.").

⁵¹¹ See Perino, *supra* note 4, at 5 n.26 ("Privacy from public disclosure means that '[m]ediators are bound not to discuss with other people what is revealed to them in the mediation unless such revelations are agreed to by the participants or compelled by a court order or statute.'" (citing Fohlberg and Taylor)).

⁵¹² See Jackson, *supra* note 104, at 13 ("In a family case, the parents may wish to limit with whom a party may discuss sensitive matters raised in a mediation (e.g., prohibiting discussion with the children or other relatives).").

⁵¹³ See Brazil, *supra* note 5, at 1026 ("Another tool that counsel might consider using to increase protection for their settlement communications is a contract with the opposition designed explicitly for the purpose of guaranteeing confidentiality. In such a contract, the parties might commit themselves not to attempt to introduce at trial on the merits, for any purpose, any statements made during settlement negotiations. Such a contract clearly would reach farther than rule 408 and erect a stone wall instead of a split rail fence between settlement negotiations and trial.").

⁵¹⁴ See Kovach, *supra* note 67, at 601 ("[E]ven with possible exceptions, the importance of the private nature of mediation cannot be overlooked; it is certainly a primary attribute.").

⁵¹⁵ See Note, *supra* note 327, at 453 ("Obligations to bargain in good faith or to reduce an agreement to writing do not evaporate when parties enter mediation...").

authority to participate in mediation. Without capacity, parties cannot make the decisions about what information they must disclose. Without good faith, parties fail to demonstrate the intention to disclose all relevant information⁵¹⁷ and to maintain confidentiality.

It is within the framework of established legal principles that the debate regarding the pros and cons of confidentiality in mediation, and about who holds the privilege,⁵¹⁸ continues. Those against the broad scope of confidentiality⁵¹⁹ conclude that there is insufficient evidence to warrant such blanket immunities.⁵²⁰ Critics claim that loss of mediator testimony goes against public policy and prevents government transparency.⁵²¹ Those in favor of broad immunity claim that granting a mediator privilege protects neutrality.⁵²² Precluding mediator testimony is seen as essential to creating

⁵¹⁶ Assessing capacity is also complicated. Courts deal with the complexities of determining in what areas an adult is incapacitated. See Erica Wood, *Addressing Capacity: What is the Role of the Mediator?* MEDIATE.COM, July 2003, <http://www.mediate.com/articles/woodE1.cfm> (last visited Feb. 17, 2012) (“Indeed, capacity is not a global concept. A court may determine an individual’s capacity to make decisions about self care and property, and may appoint a guardian or conservator,. But there is also capacity to make a will, capacity to drive or marry, capacity to stand trial, capacity to consent to medical treatment—and capacity to mediate.”).

⁵¹⁷ See Kovach, *supra* note 67, at 587 (“Elements of good faith consist of attendance and participation in mediation session, providing full information regarding finances, designation of an individual with full settlement authority”) (citing the Minnesota farmer-lender mediation statute defining the obligation of good faith which includes disclosure of financial information.).

⁵¹⁸ See Kirtley, *supra* note 1, at 30 (“The mediation process presents a unique context for the operation of an evidentiary privilege. Rather than the usual bilateral relationship in traditional privileges, mediation always involves at least three persons: the mediator and two parties.”).

⁵¹⁹ See Perino, *supra* note 4, at 27 (“A broadly-worded rule does not tell the judge either who may invoke the privilege or who controls it”).

⁵²⁰ See Gibson, *supra* note 4, at 40–41 (“There is little evidence to suggest that mediation would be ineffective if it were not confidential...Some mediation programs report high settlement rates despite the fact that they do not assure confidentiality.”).

⁵²¹ Will Pryor & Robert M. O’Boyle, *Public Policy ADR: Confidentiality in Conflict?* 46 SMU L. REV. 2208 (1992-1993) (“Some have argued that the ADR movement is on a collision course with the trend supporting open government. Critics reason that ADR defeats the interests of open government.”).

⁵²² See Rosenberg, *supra* note 1, at 160 (“It is argued that granting the privilege to the mediator ensures the preservation of the mediator’s neutrality. There is fear that unless the mediator is seen as being unbiased, parties will refuse to participate and

CONFIDENTIALITY IN MEDIATION

trust in the mediator.⁵²³ Mediator neutrality is considered an interest of the parties as well as the mediator.⁵²⁴ These claims fail to address a critique of neutrality as an illusory notion based on an assumption of the existence of objectivity.⁵²⁵ Neutrality⁵²⁶ implies that there is a reality independent of the biases of the one perceiving it.⁵²⁷ The promise of neutrality, often erroneously used interchangeably with impartiality,⁵²⁸ is meant to assure parties that the mediator has no personal stake in the outcome, which if carried to its logical conclusion, would mean the mediator should have no bias toward settlement.⁵²⁹

disclose information in a mediation proceeding. If a mediator cannot project this image, her effectiveness will be compromised.”).

⁵²³ See Deason, *Predictable Mediation Confidentiality*, *supra* note 1, at 245 (“[A] privilege enhances candid communication by building on an existing foundation of trust that is inherent in a consultation with an advisor.”).

⁵²⁴ See Note, *supra* note 327, at 456 (“The purpose of mediator neutrality indicates that it is as much an interest of the parties as is confidentiality itself. Unless a mediator is regarded as a neutral, the parties will refuse to participate in mediation...”).

⁵²⁵ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS JOURN. WOMEN IN CULTURE AND SOCIETY 644–45 (1983) (“Objectivity is liberal legalism’s conception of itself. It legitimizes itself by reflecting its view of existing society, a society it made and makes so by seeing it and calling that view, and that relation, practical rationality.”).

⁵²⁶ Sara Cobb and Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOCIAL INQUIRY 37 (Winter 1991) (“The relative absence of any research on the practice of neutrality suggests that neutrality functions like a folk concept, talked, practiced, and researched on the basis of tacit and local understanding, contained in (and by) a rhetoric about power and conflict.”).

⁵²⁷ See *id.* at 38 (“[O]bjectivity,’ (a reality independent of any observer) makes possible ‘neutrality’ (the objective position from which one can participate in social relations free of affiliation to any position).”).

⁵²⁸ Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 533 n.156 (Summer 1997) (“‘Impartiality’ is distinguished from ‘neutrality.’ The former term ...refers to performing the mediator function, in word or deed, free from favoritism or bias...‘Neutrality’ refers to the mediator’s relationship, if any, with the disputants or the dispute...Neutrality incorporates concerns with any conflict of interest of the mediator.”).

⁵²⁹ See *id.* at 510 (“[I]nherent in the nature of the mediator’s calling is a ‘bias’ in favor of settlement.”).

IV. LIMITATIONS OF CONFIDENTIALITY IN MEDIATION

A. *Legal Parameters Limiting Confidentiality Privilege*

While mediation scholars engage in the ongoing debate about confidentiality and the purposes it is meant to accomplish, the legal structures that set limits on the protection of confidentiality are not often acknowledged among practitioners or with participants. Rules of evidence and the USA PATRIOT Act are two examples of laws and rules to which many confidentiality statutes refer, either directly or indirectly, with which mediators are bound to comply.

1. *Rules of Evidence*

As we have shown, the offer of confidentiality in mediation does not emerge spontaneously from thin air.⁵³⁰ Mediation functions within the legal framework, all the while appearing to operate outside it.⁵³¹ The framework of the law provides rules of evidence that have been established over centuries for the purpose of ensuring equal treatment of litigants.⁵³² Federal and state rules of evidence allow the court to override parties' decisions to maintain confidentiality.⁵³³ The privilege excusing mediators from testifying,⁵³⁴ is

⁵³⁰ See Gibson, *supra* note 4, at 34 ("Mediator confidentiality is controlled by statute and by case law. Statutes exist in most states that have court-ordered mediation and are usually a derivative from other statutes pertaining to the non-admissibility of evidence from settlement conferences.").

⁵³¹ See Pavlich, *supra* note 20, at 711, 712 ("...community justice is described as an experiment that promises to alleviate aspects of the state's fiscal and legitimacy crises within the dispute resolution arena: It proposes cost-effective techniques aimed at local conflicts that do not directly involve state agencies...but [it is seen by critics as] an indirect form of state rule that is masked through the false ideological images erected by advocates.").

⁵³² See Delgado et al., *supra* note 340, at 1373 ("Rules of evidence also serve to reduce prejudice.").

⁵³³ See Deason, *Predictable Mediation Confidentiality*, *supra* note 1, at 240 ("[B]ecause mediation confidentiality is not (and should not be) absolute, the strength of this expectation depends on the ability to predict, at least roughly, the limits on disclosure in a future dispute. In the current legal environment, such prediction is not realistic because so many uncontrollable factors determine which of many widely varying legal frameworks a court will use to determine disclosure.").

⁵³⁴ See Ehrhardt, *supra* note 59, at 117 ("Most states have adopted some sort of a mediation privilege. Some jurisdictions broadly apply the privilege to all mediations...If

CONFIDENTIALITY IN MEDIATION

weighed against the court's duty to elicit the truth.⁵³⁵ The court determines the foundation for the protection, in each case.⁵³⁶ An evidentiary exclusion operates differently from a privilege.⁵³⁷ Rule 501 allows federal courts to decide on a case-by-case basis whether to invoke a privilege—and the courts have used the protection sparingly.⁵³⁸ Courts use the “relevancy rule” to make a determination on exclusion of evidence. The “relevancy rule” excludes offers of compromise, but not admissions of fact.⁵³⁹

Mediation falls under the protective umbrella applied to offers to compromise or settle under Federal Rule 408, or similar state rules.⁵⁴⁰ Evidence can be disclosed from a settlement negotiation when it relates to bias or prejudice of a witness, or exposes tactics to delay or obstruct criminal investigations.⁵⁴¹ Rule 408 does not exclude evidence needed to prove or disprove terms of an agreement reached during negotiation.⁵⁴² Rule 408 does not prevent information from being disclosed publicly—it only protects

the state does not protect confidentiality with a privilege, it is protected by Rule 408 or a similar common law rule protecting settlement negotiations.”).

⁵³⁵ Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 7 (1988), (quoting Wigmore: “no pledge of privacy ... can avail against demand for the truth in a court of justice.”).

⁵³⁶ See Ehrhardt, *supra* note 59, at 111 (“The Court has not articulated a precise test to apply to the recognition of a privilege. Rather it has interpreted Rule 501 as providing federal courts with flexibility to develop rules of privilege on a case-by-case basis.”).

⁵³⁷ See Rosenberg, *supra* note 1, at 165 (“The evidentiary exclusions for negotiations differ from privileges, which usually provide protection against disclosure rather than merely protection against admission into evidence at a court hearing. As a result, most mediation privileges apply in all fora as opposed to those judicial hearings that are governed by the rules of evidence.”).

⁵³⁸ See Ehrhardt, *supra* note 59, at 111.

⁵³⁹ See Note, *supra* note 327, at 447 (“The relevancy rule has led to a distinction between ‘mere’ offers to compromise, which are excluded, and independent admissions of fact which are not.”).

⁵⁴⁰ See Ehrhardt, *supra* note 59, at 103–04 (“No specific statute or court-rule is necessary for Rule 408 to be applicable in mediation proceedings, regardless of whether the mediation is voluntary or court-ordered. Mediations involve statements made during attempts to settle or compromise a claim.”).

⁵⁴¹ See *id.* at 105 (“The final sentence of Rule 408 provides that the rule does not require the exclusion of evidence relating to settlement offers when it is offered for another purpose, ‘such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.’”).

⁵⁴² See Note, *supra* note 327, at 449.

disclosure in a subsequent litigation.⁵⁴³ Thus, a privilege grants greater protection than Rule 408⁵⁴⁴ in that it may prevent parties in another proceeding from discovering information disclosed in mediation.⁵⁴⁵ Granting a mediator privilege can prevent testimony regarding credibility of a witness.⁵⁴⁶ Under rules of evidence, case-by-case decision-making by judges regarding evidentiary exclusions and privileges creates a lack of predictability for parties and difficulties for mediators in attempting to explain what is and is not, confidential.⁵⁴⁷

Transparency of governmental bodies is accomplished under the Freedom of Information Act and similar state laws.⁵⁴⁸ The judiciary, however, is not subject to the same rules of open disclosure.⁵⁴⁹ By housing mediation within the court's jurisdiction, records of the negotiation process fall outside the jurisdiction of open records acts.⁵⁵⁰ Thus, mediation functions in most situations without transparency,⁵⁵¹ while parties are often put under

⁵⁴³ See Prigoff, *supra* note 535, at 4 (“[Rule 408] provides no protection against public disclosure of information revealed in mediation ... the Rule only affects parties to subsequent litigation.”).

⁵⁴⁴ See Brazil, *supra* note 5, at 959 (“The language of rule 408 unfortunately leaves a great deal of uncertainty about the scope of the rule. Trial judges must make judgments on a relatively unguided basis in many gray areas.”).

⁵⁴⁵ See *id.* at 1023 (“As an alternative to simple two-party settlement negotiations, counsel could proceed with private mediations that are covered by recently enacted state confidentiality statutes with much greater confidence in the scope of the protection they afford.”).

⁵⁴⁶ See Ehrhardt, *supra* note 59, at 120 (“[A] privilege shields the mediation process from discovery and does not permit privileged matter to be used to impeach the credibility of a witness.”).

⁵⁴⁷ See Perino, *supra* note 4, at 33 (“[L]eaving resolution of confidentiality to case-by-case analysis, however, may give rise to the same problems of inconsistent interpretation that arise when no privilege is created. Inconsistency could limit the experiences of the privilege by making it harder for mediation participants to predict whether their statements will remain confidential.”).

⁵⁴⁸ The Freedom of Information Act 5 U.S.C. § 552, As Amended By Public Law No. 104-231, 110 Stat. 3048.

⁵⁴⁹ See Pryor & O’Boyle, *supra* note 521, at 2215.

⁵⁵⁰ See *id.*, referring to Texas: “Thus if mediation is ordered, clearly indicating that the mediator serves under the authority and direction of a court, a strong argument can be made that all records received and stored by the mediator during the negotiation process fall outside the scope of the Open Records Act.”

⁵⁵¹ Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?* 13 OHIO ST. J. ON DISP. RESOL. 1 (1997) (“Many mediators and scholars treat mediation within any model as if it were a black box

CONFIDENTIALITY IN MEDIATION

pressure from the courts to both mediate and settle.⁵⁵² Parties frequently lack an understanding of the rights they may be waiving by entering mediation.⁵⁵³ Although mediation promises fairness on the one hand, it is generally unable to balance power on the other.⁵⁵⁴ Ethical standards require the mediator to uphold neutrality and fairness, yet the relationship of procedural justice to fairness is not defined⁵⁵⁵ and it is unclear whether the court has the authority to monitor fairness.⁵⁵⁶ The lack of transparency, furthered in part through confidentiality in mediation, raises serious questions regarding both the rights of the public and rights of unrepresented parties.⁵⁵⁷ These questions are complicated exponentially by the existence of the USA PATRIOT Act.

or a kind of magic show in which the mediator ‘does her thing’ for or to the participants without explaining what ‘her thing’ is or how or why it is expected to work. Indeed, some mediators treat their role like that of a magician’s, avoiding explanations as if they were secrets that would ruin the effect of their efforts.”).

⁵⁵² See Engler, *supra* note 113, at 2020 (“Far from playing a minimal role in settlement ... judges routinely encourage and pressure litigants to settle. Court rules encourage judges to clear their dockets.”).

⁵⁵³ See *id.* at 2010 (“The mediator may encourage the unrepresented party to seek counsel or may terminate the mediation if he determines that one party is not competent to participate. Otherwise, he must attempt to mediate. Since efforts to inform an unrepresented litigant that the agreement entails the waiver of certain rights apparently amount to impermissible legal advice, the mediator must simply watch silently while the unrepresented litigant’s rights are waived.”).

⁵⁵⁴ See *id.* at 2032 (“Far from providing an impartial forum yielding fair results, the process routinely favors the more powerful party, particularly where one party is represented by counsel. The result is a process that is both unfair and partial.”).

⁵⁵⁵ See Welsh, *supra* note 267, at 191 (“The research strongly suggests that procedural justice considerations should underlie *all* of the third party processes that are institutionalized within the courts, regardless of whether those processes are consensual or non-consensual.”).

⁵⁵⁶ See Weston, *supra* note 7, at 53–54 (“Judicial authority to sanction parties for conduct or participation violations in a pretrial settlement conference or court-connected arbitration is rarely challenged on confidentiality grounds. By contrast, courts are divided as to whether mediation statutory confidentiality privileges prevent judicial consideration of similar claims in a mediation setting.”).

⁵⁵⁷ See Engler, *supra* note 113, at 2032 (“Under the guise of impartiality, the court system funnels a large number of unrepresented litigants through mediation, a forum that produces systematically unfavorable results to unrepresented litigants when measured in terms of outcome.”).

2. USA PATRIOT Act

Clearly, confidentiality is much more complex than the current expectations of privacy in mediation would indicate. Mediator assurances to parties that everything said to them during screening, orientation, and in the mediation itself is confidential, are misrepresentations. Mediators may be reluctant to overload parties with information that they believe is unnecessary in the hopes that the dispute never goes to litigation. Or, mediators may not be well informed about rules of evidence that can be used to overturn the parties' decisions to maintain confidentiality. Mediation trainers may consider it confusing to include material on constitutional privacy rights or rules of evidence, when training is focused on keeping parties out of litigation. However, without giving parties information on the limitations to confidentiality, mediation programs—even those connected with the courts—function as an alternative⁵⁵⁸ not just to litigation,⁵⁵⁹ but to the exercise of legal rights.⁵⁶⁰ In addition to the everyday legal complications surrounding confidentiality, promises of confidentiality in mediation are even more tenuous since the passage of the USA PATRIOT Act in October, 2001, 6 1/2 weeks after the attacks on the World Trade Center and the Pentagon.

Shortly after President Bush's address to the nation on September 11th, FBI agents arrived at the headquarters of EarthLink in Atlanta with subpoenas for electronic messages used by the terrorists, requesting that EarthLink install its software, called Carnivore. EarthLink declined, preferring to use its own programs to provide the information.⁵⁶¹ Perhaps to lay the ground work for the upcoming battle between the aggressive surveillance approach favored by President Bush and Attorney General

⁵⁵⁸ See Reuben, *supra* note 15, at 582–83 (“As ADR steadily seeps into the landscape of disputes, one can readily envision it silently but surely displacing public litigation as the primary means of resolving galvanized civil disputes.”)

⁵⁵⁹ See Fiss, *supra* note 29, at 1089 (“Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals. We turn to the courts because we need to, not because of some quirk in our personalities.”).

⁵⁶⁰ See Weston, *supra* note 4, at 618 (“Although some courts may be reluctant to interfere with or inquire into ADR proceedings, and although confidentiality privileges may limit the extent of judicial inquiry, an aggrieved party in court-annexed ADR generally retains the right to a trial and the option to bring claims of bad faith to the court's attention. In private contractual ADR similar protection and recourse are lacking though the concern for process abuse is more compelling because the process is entirely outside the auspices of the judicial system.”).

⁵⁶¹ See Madrinan, *supra* note 194, at 789.

CONFIDENTIALITY IN MEDIATION

Ashcroft⁵⁶² and civil liberties advocates fearing the expanded use of tools proposed by the Justice Department,⁵⁶³ President Bush stated on September 21, 2001 to a joint session of Congress⁵⁶⁴ that:

We will come together to give law enforcement the additional tools it needs to track down terror here at home.

We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act and to find them before they strike.

Soon after, the Justice Department's proposal (originally called the "Anti-Terrorism Act of 2001") was evaluated by the House of Representatives Committee on the Judiciary.⁵⁶⁵ The Justice Department argued that the law had failed to keep up with technology and that their proposal represented a "careful, balanced, long overdue improvement...to our capacity to combat terrorism."⁵⁶⁶ By October 25, 2001 both houses of Congress had passed the bill, without having time to read the final version and with little time for debate.⁵⁶⁷ When President Bush signed the PATRIOT

⁵⁶² John W. Whitehead and Steven H. Aden, *Forfeiting "Enduring Freedom" For "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AMER. U. L. REV. 1087 (2002) ("In later testimony, Ashcroft stated that the Department of Justice's mission was redefined, placing the defense of the nation and its citizens above all else. This historic 'redefinition' of the Justice Department's mission turned the focus of federal law enforcement from apprehending and incarcerating criminals to detecting and halting terrorism activity on American soil and abroad.").

⁵⁶³ See Madrinan, *supra* note 194, at 790 ("Despite the national clamor to combat terrorism in the wake of the September 11 attacks, civil liberties advocates were nonetheless alarmed by the latest proposal's grant of expansive electronic surveillance and search powers to law enforcement officials, fearing that fundamental privacy interests were being sacrificed in the name of antiterrorism.").

⁵⁶⁴ George Bush, Address to the Nation (Sept. 20, 2001) (transcript available at Transcript of President Bush's address, CNN.COM./U.S.cnn.com/u.s.), Sept. 21, 2001 (September 21, 2001 2:27 AM EDT). <http://www.studentnews.cnn.com/2001/US/09/20/gen.bush.transcript/>

⁵⁶⁵ See Madrinan, *supra* note 194, at 790-91.

⁵⁶⁶ See *id.* at 791.

⁵⁶⁷ Laura Donohue & James Walsh, *A Remedy for an Unidentified Problem*, Op-Ed, SAN FRAN. CHRON., Oct. 30, 2001, http://belfercenter.ksg.harvard.edu/publication/1151/patriot_act_a_remedy_for_an_unidentified_problem.html ("Still there were few hearings and little debate. Many representatives didn't have an opportunity to read the House version before the vote. In the Senate, the bill bypassed Judiciary Committee markup and went straight behind

Act into law on October 26, 2001, he stated that “This new law that I sign today will allow surveillance of all communications used by terrorists, including e-mails, the Internet, and cell phones.”⁵⁶⁸ In essence, the PATRIOT Act extended already existing tools used for criminal investigations, to foreign intelligence investigations that have nothing to do with criminal activities.⁵⁶⁹

One controversial section of the PATRIOT Act, Section 215,⁵⁷⁰ gives the government the authority to confiscate records from libraries and businesses

closed doors. Presented with a thumbs-up or thumbs-down option, and with little opportunity to amend the bill, few lawmakers were willing to risk being seen as ‘soft on terrorism.’”

⁵⁶⁸ *From the White House President Bush at Signing of Anti-Terrorism Bill On Oct. 26, 2001*, ABOUT.COM, <http://usgovinfo.about.com/blwhrelease20.htm>.

⁵⁶⁹ David Cole, *The Missing Patriot Debate*, THE NATION, May 30, 2005, <http://www.thenation.com/article/missing-patriot-debate>, (“The more fundamental myth is that ‘foreign intelligence’ investigations are about terrorism ... A ‘foreign intelligence’ investigation need only concern foreign-policy-related information about an agent of a foreign power—defined so broadly that it includes any foreign national employee of any organization not composed substantially of US citizens.”).

⁵⁷⁰

SEC. 215. ACCESS TO RECORDS AND OTHER ITEMS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.

Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking sections 501 through 503 and inserting the following:

SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(2) An investigation conducted under this section shall--

(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Each application under this section--

(1) shall be made to--

(A) a judge of the court established by section 103(a); or

(B) a United States Magistrate Judge under chapter 43 of title 28, United States Code, who is publicly designated by the Chief Justice of the United States to have

CONFIDENTIALITY IN MEDIATION

that previously required a grand jury subpoena.⁵⁷¹ Librarians spoke out against Section 215 soon after the PATRIOT Act was passed,⁵⁷² and continued to do so as Congress later revisited some of its provisions.⁵⁷³ Government statisticians, also alarmed by the potential violations of privacy under Section 215, have protested that the PATRIOT Act undermines the promises given by government agencies to keep government-held data confidential.⁵⁷⁴ Other concerns address the threat to constitutional

the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to protect against international terrorism or clandestine intelligence activities.

(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

⁵⁷¹ See Cole, *supra* note 569 (“[A] grand jury subpoena is available only when the government has sufficient grounds to believe a crime has been committed to go to the trouble of empaneling a grand jury. Section 215 can be triggered without any evidence of wrongdoing whatsoever.”).

⁵⁷² See Minnow, *supra* note 90 (“[L]ibrarians do have discretion in the actual practice of creating and maintaining records in the first place. By better understanding the Patriot Act and knowing what to do if faced with an incident, librarians can be prepared to do the right thing and protect privacy.”).

⁵⁷³ Steven J. DuBord, *Librarians Unite Against Patriot Act Provisions*, THE NEW AMERICAN, (December 4, 2009, 12:56), <http://www.thenewamerican.com/index.php/usnews/congress/2467-librarians-unite-against-patriot-act-provisions> (“Librarians are virtually united in opposing the renewal of the Patriot Act provisions that are set to expire this December 31, 2009. Thirty-two state chapters of the American Library Association (ALA) have passed resolutions calling for Congress to allow Section 215 of the act to expire.”).

⁵⁷⁴ Douglas J. Sylvester & Sharon Lohr, *Counting on Confidentiality: Legal and Statistical Approaches to Federal Privacy Law After the USA Patriot Act*, 2005 WIS. L. REV. 1033, 1061 (2005) (“Statisticians in federal agencies and other statisticians concerned about confidentiality, perhaps caught initially unaware by the Patriot Act’s intended reach and potential damage, immediately began seeking solutions to its trust-

protections surrounding search and seizure, such as probable cause and judicial review.⁵⁷⁵ In general, the USA PATRIOT Act threatens the protection of privacy of individuals⁵⁷⁶ at the same time it increases state power⁵⁷⁷ and government secrecy.⁵⁷⁸ Section 215 is as applicable to mediation as it is to libraries and private businesses.⁵⁷⁹ Under Section 215, if a mediator's records were taken, she could not inform the parties⁵⁸⁰ and would be protected from prosecution for complying.⁵⁸¹ Yet, almost no

eroding potential. They have been vocal critics of attempts by government investigatory agencies to violate the confidentiality of personal information.”).

⁵⁷⁵ See Rotenberg, *supra* note 91, at 1118 (“The Act limits safeguards created by fifteen statutes. It reduces probable cause standards in key laws. It significantly expands the authority of the Foreign Intelligence Surveillance Act. It limits judicial review. It creates a new ‘sneak and peek’ provision for police to undertake searches without the customary notification requirement.”).

⁵⁷⁶ See Sylvester & Lohr, *supra* note 574, at 1085 (“Embedding privacy in an individual right places undue burdens on individuals to control their data, an increasingly difficult challenge in the information age.”).

⁵⁷⁷ See Rotenberg, *supra* note 91, at 1132–33 (“[P]rivacy law is established to rectify asymmetries in power and to protect the rights of individuals against institutions that are able to delve deeply into our private lives. Viewed in this light, the developments since September 11 should be seen as an expansion of state power and a consequential limitation on the freedom of individuals.”).

⁵⁷⁸ See *id.* (“There has been no beneficial tradeoff between privacy and openness...[t]here has simply been greater exposure of private life and greater secrecy surrounding the actions of government.”).

⁵⁷⁹ See Sylvester & Lohr, *supra* note 574, at 1060 (stating that: “Although Section 215’s heading ... refers to ‘business records’ its actual provisions do not limit the nature of information that may be included in ‘tangible things,’ nor does it limit the sources from which such information may be requested.”).

⁵⁸⁰ Thomas J. Costello, *The Economic Trade-Offs of Privacy: Exploring the Interaction of Economics and Privacy in the Formulation of Privacy Policy*, Professional Report for the Degree of Master of Public Affairs, University of Texas at Austin, 31, (2003) (“While the potential for an investigation by law enforcement is a privacy concern and has proven to be contentious for many, an even more controversial area within Section 215 is subsection 501(d). This provision makes it illegal to discuss searches, even with those persons whose records are the subject of the subpoena.”).

⁵⁸¹ See Sylvester & Lohr, *supra* note 574, at 1061 (“[A] section 215 warrant cannot be disclosed by the person to whom it was served. When an individual complies in good faith with a section 215 warrant, he or she is granted immunity. In other words, while the Patriot Act does not make release of otherwise confidential items legal, it does insulate the recipient from legal action for any conduct undertaken pursuant to the warrant.”) (internal citations omitted).

mention of concern about the impact of Section 215 on confidentiality in mediation has been made.⁵⁸²

While the Justice Department insists it is targeting only suspected terrorists, the PATRIOT Act expands the definition of “domestic terrorism” to cast a wide net.⁵⁸³ Non-citizens, both documented and undocumented, are targeted in the Act.⁵⁸⁴ The vague terminology in the Act allows the government to search or confiscate papers in the very manner that the Fourth Amendment was designed to prevent by a sweeping search of documents⁵⁸⁵ in order to produce evidence of wrongdoing.⁵⁸⁶ Thus, mediators should be alarmed by the threat to confidentiality in the USA PATRIOT Act as long as it remains in place.⁵⁸⁷ It cannot be claimed that this has never occurred. How

⁵⁸² Susan Oberman, *Mediation and The Right To Privacy: Confidentiality, The USA PATRIOT Act, And Us*, MEDIATE.COM, (June, 2009), <http://www.mediate.com/articles/obermanS1.cfm>. First published in the Virginia Mediation Network online newsletter, Fall, 2007. A workshop entitled “Confidentiality and the Right To Privacy” which raised the issues regarding the USA PATRIOT Act and confidentiality in mediation, was presented by Susan Oberman at the Virginia Mediation Network Conference, October 7, 2008.

⁵⁸³ See Whitehead & Aden, *supra* note 562, at 1092 (“At the same time that the Justice Department is ostensibly targeting only this ‘narrow class of individuals’ [terrorists] it has greatly expanded that class of suspects through the Patriot Act. Section 802 of the Act amends the criminal code 18 U.S.C. § 2331, to add a new definition of ‘domestic terrorism.’”).

⁵⁸⁴ See *id.* at 1095 ([T]he lack of concern for the rights of non-citizens runs thematically through the Administration’s response to the terrorist attacks.”).

⁵⁸⁵ Grant Gross, *ACLU, other groups sue US gov’t over border laptop searches*, IT WORLD (September 7, 2010, 12:45 PM), <http://www.itworld.com/hardware/119862/aclu-other-groups-sue-us-govt-over-border-laptop-searches> (“The American Civil Liberties Union and other groups have filed a lawsuit challenging the U.S. Customs and Border Protection (CBP) practice of searching laptops and other electronic devices at U.S. borders..The lawsuit, filed Tuesday by the ACLU, the New York Civil Liberties Union and the National Association of Criminal Defense Layers (NACDL), challenges a 2008 CBP policy that allows border agents to search electronic devices of any traveler, without suspicion of wrongdoing.”).

⁵⁸⁶ See Madrinan, *supra* note 194, at 824 (“[W]hen the Bill of Rights’ framers identified ‘papers’ in the category of items to be secured by the Fourth Amendment, one of the British tyrannies they sought to prevent in America was the agents of the executive indiscriminately rummaging through documents.”).

⁵⁸⁷ Felicia Sonmez, *Patriot Act Extension passes House, one week after unexpected defeat*, WASH. POST (Feb. 14, 2011, 7:17 PM ET), <http://voices.washingtonpost.com/44/2011/02/patriot-act-extension-passes-h.html> (“The House approved Monday a measure that would extend key provisions of the Patriot Act through December...One of the provisions authorized the FBI to continue using roving

would we know? Many confidentiality statutes and rules acknowledge that the privilege is subject to review under other laws and rules. The USA PATRIOT Act is certainly one such law.

C. Mediators' Duty to Explain Confidentiality Prior to Mediation

Informing parties of confidentiality limitations under constitutional and statutory laws and court rules⁵⁸⁸ is essential to the exercise of self-determination.⁵⁸⁹ Self-determination rests in several choices the parties must make: whether to participate in mediation, what model is best for them,⁵⁹⁰ and whether to maintain or waive confidentiality. Regardless of mediation model,⁵⁹¹ all mediators practice norm-advocating⁵⁹² mediation while explaining the agreement to mediate, especially regarding confidentiality decisions. Mediators may be reluctant to address the complexities surrounding confidentiality, yet in doing so can lay the groundwork for the negotiation of the substantive issues to follow. Parties negotiating

wiretaps on surveillance targets; the second allows the government to access 'any tangible items,' such as library records, in the course of surveillance; and the third is a 'lone wolf' provision that allows for the surveillance of targets who are not connected to an identified terrorist group.").

⁵⁸⁸ See Johnson, *supra* note 446, at 490 ("Most participants in mediation, including the mediator, are unaware of their duty to testify despite the fact that they have signed confidentiality agreements In the interest of fairness, parties should know beforehand what will be disclosed and what will remain confidential; notice allows parties to behave accordingly.").

⁵⁸⁹ See Weckstein, *supra* note 528, at 557 ("[A] key professional role of the mediator is to maximize self-determination based upon informed consent, exercised within the confines of the societal purpose of the dispute resolution context.").

⁵⁹⁰ Dorothy Della Noce, *What Is a Model for Mediation Practice? A Critical Review of Family Mediation: Contemporary Issues*, 15 MED. Q. 135, 136 (Winter 1997) ("The term *model* is used loosely in the mediation field, often interchangeably with *style*, *approach* and *orientation*. Yet *model* implies something more substantial than a practitioner's preference or idiosyncratic style. It suggests an example of practice that is capable and worthy of imitation, a clear and detailed exemplar to which a practitioner can refer for guidance.").

⁵⁹¹ See Oberman, *supra* note 11, at 813–15.

⁵⁹² Ellen Waldman, *The Challenge of Certification: How To Ensure Mediator Competence While Preserving Diversity*, 30 U. S.F. L. REV. 735 (Spring 1996) (A norm-advocating mediator "relays information to the parties about relevant social norms, not simply to augment the parties ability to make informed decisions, but to ensure that their agreement concords with these norms.").

CONFIDENTIALITY IN MEDIATION

confidentiality before the mediation begins gives the mediator an opportunity to establish trust in the process and demonstrate possibility of consensus.

Knowing the legal context in which mediation functions is critical to uphold the standard of self-determination.⁵⁹³ Informed decision-making⁵⁹⁴ is the basis for self-determination⁵⁹⁵ and consent.⁵⁹⁶ Mediators should learn the rights they offer to protect when they promise confidentiality. The purpose of confidentiality in mediation is to preserve individual privacy rights,⁵⁹⁷ given the vast majority of states that have sought to protect it through legislation and court rules.⁵⁹⁸ Mediators are responsible for clarifying both the protections and the limitations of confidentiality in their respective states.⁵⁹⁹

⁵⁹³ See Welsh, *supra* note 491, at 8 (“The vision of self-determination that inspired the contemporary mediation movement placed the disputants themselves at the center of the mediation process...It was assumed that the parties would *actively and directly participate* in the communication and negotiation that occurs during mediation, would *choose and control* the substantive norms to guide their decision-making, would *create* the options for settlement of their dispute, and ultimately would *control* the final decision regarding whether or not to settle their dispute in mediation.”).

⁵⁹⁴ See Engler, *supra* note 113, at 2025 (“As in the medical context, the issue of how much information must be disclosed to ensure informed consent is an enormous one. Yet the central concept remains valid: for a decision to be informed, the litigant must have had the ‘opportunity to evaluate knowledgeably the options available and the risks attendant upon each.’”).

⁵⁹⁵ See Weckstein, *supra* note 528, at 503 (“The key to self-determination is informed consent. A disputant who is unaware of relevant facts or law that if known, would influence that party’s decision cannot engage in meaningful self-determination.”).

⁵⁹⁶ See Nolan-Haley, *supra* note 8, at 778 (“Informed consent prepares the way for a party to participate voluntarily and intelligently in the mediation process and to accept the outcome...informed consent matters because the potential for coercion, incapacity and ignorance can impede the consensual underpinnings of the mediation process.”).

⁵⁹⁷ See Fried, *supra* note 144, at 478 (“The view of morality upon which my conception of privacy rests is one which recognizes basic rights in persons, rights to which all are entitled equally, by virtue of their status as persons.”).

⁵⁹⁸ See *supra* note 36.

⁵⁹⁹ Most courts have created ethical standards for mediators that include explaining confidentiality as one of the mediator’s responsibilities.

V. CONCLUSION

The mediation process occurs at a junction of public and private life.⁶⁰⁰ Mediation within families, schools, corporations, community groups, and neighborhoods, operates on a slippery slope, promising confidentiality on one hand, and requiring mediators and parties to be vigilant in assessing what is confidential and what must be reported on another. Mediators are among those considered to represent a stewardship role to protect those who cannot protect themselves.⁶⁰¹ Statutes and court rules defining what is and what is not confidential acknowledge the duty of the mediator to report under some circumstances (intent to commit a crime, harm one's self or another, abuse a child or incapacitated adult, etc.).

As we have tried to show, finding the line between public and private is elusive.⁶⁰² Community mediation—which claims to provide community justice⁶⁰³—places the focus on individuals, thereby transforming community issues into personal ones.⁶⁰⁴ Critics argue that, rather than supporting justice and the protection of the law, mediation eliminates history and context.⁶⁰⁵

⁶⁰⁰ See Reuben, *supra* note 15, at 589 (“While conventional wisdom holds that ADR and public litigation operate as independent ‘public’ and ‘private’ spheres...they really represent two different spheres within the single galaxy of *public* dispute resolution.”).

⁶⁰¹ See Gibson, *supra* note 4, at 53 n.148 (“[T]he affirmative force that creates a duty to report derives from the fact that the individual is unable to mitigate th[e] suffering himself or herself. In effect the law adopts a stewardship role for those who lack the ability to assert their own rights.”).

⁶⁰² Joseph B. Stulberg, *Questions*, 17 OHIO ST. J. ON DISP. RESOL. 537, 538 (2002) (“[W]hat, in fact, occurs in mediated conversations is uncharted territory rich with potential for providing us insights into how legal obligations and non-legal normative values interface in shaping the conduct of parties to a mediation. We might discover, importantly, that the presumed dichotomy between the two is not as pronounced as some might believe, thereby demolishing the perception that private and public ‘justice’ norms are operating at cross-purposes.”).

⁶⁰³ Christine B. Harrington and Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC. REV. 717 (1988) (“Community justice associates mediation with democratic values, such as community participation and neighborhood self-governance, and it evokes the sense of a cohesive community.”).

⁶⁰⁴ Sara Cobb, *Einsteinian Practice and Newtonian Discourse: An Ethical Crisis in Mediation*, 7 NEG. J. 9 (January, 1991) (“[B]y focusing on psychological phenomena such as attitudes, feelings, perceptions, needs, interests ... we unwittingly maintain the focus on individuals rather than on relational systems.”).

⁶⁰⁵ See Grillo, *supra* note 278, at 1564 (“[W]hile one of the principal justifications for introducing mediation into the divorce process is that context will be substituted to

While contending that the process is voluntary⁶⁰⁶ and belongs to the parties, mediation advocates find it necessary to assuage fears of ever-increasing pressure through the courts to direct parties into mediation.⁶⁰⁷ Thus, dealing with confidentiality within the framework of the legal system is fraught with contradictions⁶⁰⁸ and questions. Is confidentiality always beneficial to all parties? How can parties determine what is best for them? How does a mediator ensure that parties are exercising informed consent?

These questions need to be raised, and though they remain unanswered, confidentiality continues to be one of the major selling points of mediation. The decision to maintain or waive the right to keep information from being disclosed in court and to the public is a direct exercise of the right to privacy.⁶⁰⁹ Presenting information about confidentiality is a key point at which the mediator represents the court and the law.⁶¹⁰ Over-simplification of the protection of confidentiality is not in compliance with self-determination,⁶¹¹ as it would fail to provide parties with all relevant information.⁶¹² In many states, the rules and laws governing mediation indicate that confidentiality is subject to other laws that can override it.

abstract principles, in fact, by eliminating discussion of the past, context—in the sense of the relationship's history—is removed. The result is that we are left with neither principles nor context as a basis for decisionmaking.”).

⁶⁰⁶ See Hedeem, *supra* note 35.

⁶⁰⁷ See Phillips, *supra* note 34.

⁶⁰⁸ Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION. J. 227 (July 1995), (“[M]ediation, as a more open process, can attempt to take account of legal, economic, and social rights and entitlements while also being sensitive to individual and community needs and interests.”).

⁶⁰⁹ See Rosenberg, *supra* note 1, at 181 (“The mediation privilege involves matters of substantive policy. The courts should recognize that, implicit in the assertion of a privilege, is an important issue of what constitutes fair treatment of the individual and her right of privacy, particularly in civil litigation.”).

⁶¹⁰ See Reuben, *supra* note 15, at 629 (“[T]he mandatory statutory schemes that allocate the roles of the private ADR providers and the public courts toward the single end of state-enforced dispute resolution can establish an inseverable and indispensable nexus between the seemingly private actors and their governmental partners.”).

⁶¹¹ See Nolan-Haley, *supra* note 32, at 87 (“Even mediation’s most favored virtue, self-determination, may be of limited value as an indicator of the justice of court mediation. Without knowledge of their legal rights, the exercise of self-determination is simply a feel good process.”).

⁶¹² See Hughes, *supra* note 10, at 72 (“[A] party is not exercising self-determination if they do not have complete information or at least the pertinent information in question. Any decision arising from this situation is neither voluntary or informed.”).

Regardless of the ongoing debate about evaluative vs. facilitative “styles”⁶¹³ that addresses the role of the mediator in giving information about the substance of a dispute,⁶¹⁴ all mediators are responsible for informing parties of the legal parameters surrounding the mediation process. Mediation training⁶¹⁵ and course work⁶¹⁶ should include the specifics of confidentiality

⁶¹³ See Oberman, *supra* note 12, at 30 (“[S]tyle as a formulation for recognizing differences continues to obscure them, and makes it impossible for consumers to know what process they will encounter. Current descriptions of mediator styles do not provide accurate distinctions among mediator practices.”).

⁶¹⁴ See generally James J. Alfini, Moderator, *Evaluative Versus Facilitative Mediation: A Discussion* 24 FLA. ST. U. L. REV. 919 (1997); Richard Birke, *Evaluation and Facilitation: Moving Past either/Or*, 2000 J. DISP. RESOL. 309 (2000); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 28 FLA. ST. U. L. REV. 937 (1997); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RES. 295 (2000); Randolph L. Lowry, *To Evaluate or Not That Is Not the Question*, 38 FAM. & CON. CTS. REV. 48 (2000); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices* 11 NEGOT. JOURN. 217 (1995); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997); Leonard Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003); Leonard Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 8 (1996); Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. 371 (2000); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientation: Piercing the 'Grid' Lock*, 24 FL. ST. U. L. REV. 985 (1997); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998); Weckstein, *supra* note 531.

⁶¹⁵ Diane J. Levin, *Mediation Credentialing: What About Mediation Trainers?* MEDIATE.COM (June, 2009), <http://www.mediate.com/articles/LevinDbl20090629.cfm#top> (“[M]ediation trainers and training programs that prepare mediators for private practice are unregulated. Just as anyone can hold themselves out as a mediator in private practice, so, too, can anyone hold themselves out as a trainer of mediators. Quality of programs vary widely; some programs are good and some are not. Even if a mediator has 30 or 40 or 400 hours of training, where's the assurance that any of that training was conducted by competent, knowledgeable instructors?”).

⁶¹⁶ Lela Porter Love, *Twenty-Five Years Later with Promises To Keep: Legal Education in Dispute Resolution and Training of Mediators*, 17 OHIO ST. J. ON DISP. RESOL. 597, 598 (2002) (“In many law schools ADR has been incorporated into the curriculum by integrating dispute resolution into standard courses, expanding ADR

in the particular state,⁶¹⁷ including its limitations,⁶¹⁸ and the historical context in which confidentiality has found its place. If courts may override confidentiality agreements using the “compelling interests of the state” test,⁶¹⁹ then mediators as state actors are giving information to participants that has significant legal consequences.⁶²⁰

This article contends that mediators oversee constitutional and statutory protections when presenting parties with the choice to maintain or waive confidentiality. Despite claims that mediation is a process that gives parties the authority to make decisions based on their own values and sense of fairness,⁶²¹ mediation is, in reality, regulated by statutes and court rules in forty-nine states and the District of Columbia. Though some argue the mediator role does not include giving legal information⁶²² while others claim it is essential,⁶²³ the dominant rhetoric of the ADR community is about party

initiatives in an incremental fashion, and, as almost every law school has done, adding ADR courses to the curriculum.”).

⁶¹⁷ Charles Pou Jr., *Enough Rules Already!* DISP. RESOL. MAG. 20 (Winter 2004), (stating that: “Basic and advanced mediation training programs should place systematic exploration of applicable codes much closer to the core of their curricula.”).

⁶¹⁸ See Note, *supra* note 327, at 452 (“Any protection of mediation must recognize the limits imposed on confidentiality by the nature of a negotiation process itself.”).

⁶¹⁹ See Baker, *supra* note 50, at 1171 (“If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. A critical question then becomes the types of state interests that can justify such infringement.”).

⁶²⁰ See Thompson, *supra* note 31, at 515 (“[T]he penchant for confidentiality and secrecy, resulting in overlapping privilege rules, makes it difficult for parties to litigate claims of unfairness in the mediation process...Legitimate concerns about confidentiality or other bright-line rules should not totally deprive participants the opportunity to raise basic claims of unfair treatment.”).

⁶²¹ See Nolan-Haley, *supra* note 32, at 56 (“Instead of law, free-standing normative standards govern in mediation, and parties actually affected by a dispute decide what factors should influence the efforts to resolve that dispute. Thus, The the moral reference point in mediation is the self, and individualized notions of fairness, justice, morality, ethics, and culture may trump the values associated with any objective framework provided by law.”).

⁶²² See Waldman, *The Challenge of Certification*, *supra* note 592, at 733 (“Attention to social or legal norms is thought to constrict the parties’ consideration of issues and limit the scope of reviewable options.”)

⁶²³ See *id.* at 734 (“[A] mediator following the norm-educating model believes the parties should receive information about legal entitlements and relevant financial, technical, or psychological data before making irrevocable decisions.”).

empowerment.⁶²⁴ Yet power imbalances in the society are reproduced in the relationship between parties in mediation⁶²⁵ and in selection of mediators.⁶²⁶ In litigation the court must balance individual rights with state/public interests.⁶²⁷ In mediation, a sphere of privacy—the right to autonomy—is protected,⁶²⁸ allowing parties to decide to whom they disclose information about themselves, and what actions they wish to take.⁶²⁹ Choosing mediation, while important and often valuable, should not require parties to abdicate other “inalienable” rights.⁶³⁰ Recognizing mediation’s place within the realm of the court⁶³¹ provides a reference point,⁶³² not just to confidentiality and privacy, but to due process and justice.⁶³³

⁶²⁴ Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEG. J. 245 (July 1993) (“Despite the vagueness of existing definitions of empowerment and the relative absence of theory or research on the subject, there seems to be considerable consensus about its worth. Empowerment sells. The promise of empowerment, rooted in the discourse about democracy, affirms and even helps to construct out faith in the American way, our belief in the politics of participation.”).

⁶²⁵ See Harrington & Merry, *supra* note 603, at 720 (“Voluntary participation in mediation is viewed as enhancing the development of an individual’s capacity to take responsibility for his or her problems and work out consensual agreements with others This ideological project does not promise that mediation will change power relations or transform communities, it only attempts to make people happier where they are.”).

⁶²⁶ See *id.* at 730 (“Despite the efforts of local programs to have a variety of mediators from all ethnic, class, and educational backgrounds, the demand for neutral mediators and the detached stance tends to favor people with professional backgrounds.”).

⁶²⁷ See Stulberg, *supra* note 602, at 536 (“We celebrate the rule of law in part because it reflects the uniform application of public rules to every citizen irrespective of her wealth, social standing, race, ethnicity, or political power.”).

⁶²⁸ See *id.* (“[W]e cherish autonomy and freedom because it encourages each of us to fashion plans and decisions in a way that reflects our most fundamental beliefs.”).

⁶²⁹ See Baker, *supra* note 50, at 1163.

⁶³⁰ See Nolan-Haley, *supra* note 8, at 821 (“By agreeing to attempt to resolve disputes through the mediation process, parties may, in effect, be waiving their right to seek redress through the formal legal system and the right to receive the benefits of that system.”).

⁶³¹ Wayne Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?* 18 OHIO ST. J. ON DISP. RESOL. 97 (2002) (“Because the public’s trust and confidence in the courts is their most precious and essential asset, courts that sponsor ADR programs must promise the public that those programs will do nothing to diminish or undermine that trust and confidence, but, instead, will enhance it.”).

⁶³² See Hyman & Love, *supra* note 140, at 162 (“To a significant degree, the public law provides the norms that guide most private dispute resolution. Parties often settle

disputes by keeping in mind and balancing the entitlements the litigation system promises.”)

⁶³³ See Nolan-Haley, *supra* note 32, at 49 n.6 (“‘Justice through law,’ the type of justice which litigants expect to receive in the court system, has both procedural and substantive components. Procedurally, it means a fair process—the opportunity to be heard; substantively, it is based on the application of objective legal norms.”).

